PRIVACY PROTECTION ACT

HEARING

BE ORE THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-SIXTH CONGRESS

SECOND SESSION

ON

S. 115, S. 1790, and S. 1816

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[96th Congress]

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PRIVACY PROTECTION ACT

FRIDAY, MARCH 28, 1980

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 9 a.m., in room 2228, Dirksen Senate Office Building, Hon. Birch Bayh, (acting chairman), presiding.

Present: Senators Bayh, Baucus, and Mathias.

Also present: Kevin O. Faley, chief counsel and executive director; Marcia Atcheson, general counsel; Mary K. Jolly, staff director and counsel; Linda Rogers-Kingsbury, deputy staff director and chief clerk; Christie F. Johnson, assistant clerk; Brian Fitzgerald, staff assistant; Donald Pupke, staff assistant [Subcommittee on the Constitution]; Robert McNamara, Jr., Patti Saris, staff counsel [full committee], Eric Hultman, minority counsel; Patrick Harkins, Senator Baucus' staff; Arthur Briskman, Senator Heflin's staff; Barry Hirschowitz, legal assistant, Senator Mathias' staff; Michael Klipper, counsel, Senator Mathias' staff; Yolanda McClain Branche, counsel, Senator Dole's staff; Stephen Markman, minority counsel, Senator Hatch's staff; Charles Wood, counsel, Senator Simpson's staff and John F. Nash, Jr., minority counsel, Senator Laxalt's staff.

Senator BAYH [acting chairman, presiding]. The Committee on the Judiciary will come to order.

As you know, the Judiciary Committee reported out titles 1 and 4 of S. 1790. That was the press protection part of our Stanford Daily bill that we have been studying for some time, following the Supreme Court decision on *Zurcher* v. *Stanford Daily*.

I have opening statements that I will ask our official reporter to put into the record in order to spare those of you here the necessity of sitting through it, because I think it is important to get to our witnesses. They are busy.

[Opening statements of Senators Kennedy, Bayh, Baucus, and Mathias follow:]

OPENING STATEMENT OF SENATOR EDWARD M. KENNEDY, CHAIRMAN, COMMITTEE ON THE JUDICIARY

Senator KENNEDY. The Judiciary Committee will hold hearings today on privacy protection legislation which is designed to protect the press and other third parties not suspected of a crime from unannounced police searches. Introduced in response to the controversial 1978 Supreme Court case, *Zurcher* v. *Stanford Daily*, this legislation

deals with fundamental values long treasured by our society: the first amendment freedom of the press, and the right of American citizens to privacy in their homes.

In *Stanford Daily*, a case involving the search of a student newspaper, the Supreme Court held that the police may forcibly and without notice, search a person's home or business for evidence of a crime even if that person is "not then reasonably suspected" of complicity in the crime. The Court rejected the argument that the press should receive special protection from search warrants, stating that the fourth amendment affords "sufficient protection" to the first amendment activities of the press in gathering and disseminating information to the public. However, Justice White, speaking for the majority, noted that the Congress was free to establish nonconstitutional protections against abuses of the search warrant rule where innocent third parties are involved. Today we are responding to that invitation.

It is my firm belief that the *Stanford Daily* case unnecessarily impedes the ability of the press to report effectively on the daily activities of government officials and on other important current events. By exposing the work product of reporters to the roving eye of any policeman who has obtained a search warrant to examine newsroom documents, it threatens to dry up the confidential sources of information which form the backbone of investigative journalism. As Justice Stewart stated in his dissent, the knowledge that police officers can make an unannounced raid on a newsroom is "bound to have a deterrent effect on the availability of confidential news sources" and thereby diminish "the flow of potentially important information to the public." This is an unacceptable result in a society like ours which—as historian Alexis DeTocqueville so accurately depicts—relies on the press "to detect the secret springs of political designs and to summon the leaders of all parties in turn to the bar of public opinion." Clearly additional procedures in the first amendment area are warranted.

Moreover, I believe that the *Stanford Daily* case raises problems that extend beyond the periphery of the first amendment and affect the privacy rights of all Americans. In the last decade, the American people have grown increasingly concerned about the threat to privacy posed by broad governmental access to private records. A recent nationwide Harris poll shows that 74 percent of the American public believes that the United States is "very close" or "somewhat close" to being an Orwellian world where the Government has access to personal files with confidential information.

The *Stanford Daily* case seriously erodes the privacy rights of American citizens by permitting the Government to have unannounced access to the personal information we provide to our doctors, hospitals, lawyers, insurance companies, banks and other third party record holders despite our reasonable expectations that this information will remain confidential. I share the numerous concerns articulated by Justice Stevens in his dissenting opinion. Why should a policeman be able to examine documents which are privileged under State and Federal law? The search warrant procedure enables the Government to obtain access to privileged documents in the custody of innocent persons that could never have been legally examined if those persons had had an opportunity to object in court to the search. Moreover, a

search warrant permitting examination of documents will inevitably permit the examination of private matters not covered by the warrant. Absent compelling circumstances, I question whether the Government should be permitted to search randomly through confidential information of innocent third parties who are in no way suspected of a crime when the issuance of a subpena would result in the release of the information.

Of course, any legislative proposal dealing with these privacy interests must address the extremely important problem of effective law enforcement. As the author of the Criminal Code reform bill and the chief sponsor of the FBI charter legislation, I am extremely concerned about the effects of legislation to deal with *Stanford Daily* on the ability of our law enforcement agencies, on both the Federal and State levels, to investigate organized crime, and other white collar violations. Certainly any legislation will have to be sensitive to the practical realities of the rough and tumble world of criminal investigations. For example, as Justice White pointed out, search warrants are often employed early in an investigation, long before it is clear who the perpetrators of a crime are. We must be careful not to raise unreasonable and unduly burdensome roadblocks for enforcement officials in obtaining access to documents which are in the hands of a third party who may not himself be suspected of a crime, but who may have such close connections with the object of the investigation that the issuance of a subpena might result in the destruction or concealment of information.

The legislation before this committee attempts to tackle the extremely difficult problem of establishing procedures which will maximize the protection of the press and other innocent third parties while at the same time not unnecessarily interfering with effective law enforcement. Each of the bills—S. 1790, introduced by Senator Bayh, S. 115, introduced by Senator Mathias, and S. 1816, introduced by Senator Nelson—take a somewhat different approach to resolving this tension. In essence, these bills establish a subpena-first rule which forbids the issuance of a warrant to search for materials in the possession of one not suspected of a crime where a subpena is practicable. This approach was first formulated by the district and circuit courts in the *Stanford Daily* case, and has subsequently been adopted by the Justice Department in investigations involving the press.

Today the committee will be examining the privacy protection legislation (titles I and IV of S. 1790) unanimously reported last January by the Subcommittee on the Constitution, chaired by Senator Bayh, and related bills. The committee will also be looking at H.R. 3486 as reported out of the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice, chaired by Congressman Kastenmeier, which takes the broad third party approach on the Federal level.

I look forward to the testimony of all the witnesses today on whether the privacy protection legislation strikes the correct balance between our interest in law enforcement and in the rights of third parties not suspected of crimes. In particular, I am interested in the viewpoints of those with experience in the law enforcement area on exactly how these legislative approaches will effect criminal in-

vestigations. I also look forward to hearing testimony on the difficult constitutional question of whether the Congress has the power to create third party search protection on the State and local levels under the 14th amendment.

In closing, I would like to commend Senator Bayh, Senator Mathias and the administration for their creative efforts in this area. Their legislation provides a necessary impetus to spark debate on these extremely important issues in our society. I am confident that these hearings will shed light on the best legislative approach to the *Stanford Daily* case.

OPENING STATEMENT OF HON. BIRCH BAYH, A U.S. SENATOR FROM THE STATE OF INDIANA

Senator BAYH. Today, the Judiciary Committee holds a hearing on legislation which has been introduced in response to the Supreme Court's decision in the case *Zurcher* v. *Stanford Daily*. It has been almost 2 years since the court handed down a ruling which came as a surprise to many of us. A majority of the Court said that a police officer armed with a warrant could present himself at the office or home of any one of us, without notice, and forcibly search the premises for evidence of a crime, even though we knew nothing of and were not implicated in any way in the offense under investigation.

In our Nation's heritage there has long been imbedded the notion that a man's home is his castle. As William Pitt said:

> The poorest man in his cottage may bid defiance to all forces of the crown. It may be frail, its roof may shake, the wind may blow through it, the storm may enter, but the King of England cannot enter.

Well before our own Bill of Rights, our English legal traditions proclaimed that there are boundaries beyond which the State cannot intrude on people's lives and property. In America, the colonists suffered long and painful experience with the King's men entering and ransacking homes and businesses on the mere showing of general warrants or writs of assistance. It was out of these traditions and personal encounters that the fourth amendment was drafted to establish "the right of the people to be secure in their persons, houses, papers, and effects." Suddenly, the *Stanford Daily* case made clear to us that there were limits we had not known of in our "right to be secure."

Very shortly after the court's decision, I introduced legislation designed to protect innocent third parties against the very real dangers to their rights to privacy posed by the *Stanford Daily* decision. My bill was written to apply these protections to all citizens not suspected of criminal activity and to all levels of government, Federal, State and local.

Within a month of the Court's decision, the Subcommittee on the Constitution, which I have the honor to chair, began a series of hearings on the decision and its implications on the constitutional rights of innocent American citizens. We heard from a wide variety of witnesses who were concerned, as I was, over the fundamental change in the traditional relationship between the innocent law-abiding citizen

and his or her Government implicit in the unannounced searches of their property condoned by the Court in *Stanford Daily*.

I was particularly concerned by the chilling effects this would pose on the vigorous exercise of first amendment rights by the press. As our previous hearings showed, the very nature of the news media requires them to gather information concerning a wide variety of people and organizations. When investigating corruption, the fruits of these investigations could almost routinely be considered "evidence" relating to crimes and would therefore be subject to seizure in unannounced police raids of newspapers, radio, and television stations.

The administration responded to these same concerns in December 1978, and in April of last year I was pleased to introduce its legislative proposal, the First Amendment Privacy Protection Act. While fully in accord with its provisions, I was troubled that the bill did not extend to all innocent third parties but simply to those engaged in press activity. In September I introduced S. 1790, a composite bill which embodied both the administration's approach to the *Stanford Daily* issue, and the concepts of broader third party protection which had been explored in subcommittee hearings.

On January 31 the subcommittee reported favorably only the press protection portions of S. 1790. At the same time, however, the members requested that the full committee hear testimony on the broader scope of the bill, as well as related legislation dealing with third party protection.

In our hearing today, all of us, witnesses as well as committee members will be addressing the underlying issue posed by the Supreme Court: how to balance the rights of individual citizens and the rights of Government. Many citizens today are concerned that this balance is being lost. At times, the raw power of the Government, the size of the bureaucracy, the blizzard of regulations, and the tax burden seem to overwhelm the individual American citizen. With the *Stanford Daily* decision, we have encountered a new and even more disturbing issue—the right of the Government to search through confidential information for evidence of someone else's crimes.

Therefore, we have to ask ourselves: How do we balance the offensive intrusion on the privacy of the ordinary citizen against society's interest in law enforcement? It is not an easy question to answer. As Justice Jackson remarked over 30 years ago, "The right to be secure against searches and seizures is one of the most difficult to protect." Certainly, one of our first responsibilities is to adequately ascertain just how society's interest in law enforcement is affected by protecting the individual from unannounced searches. Will law enforcement, in fact, be weakened by insisting on less intrusive investigative means when dealing with people who are not involved in any crime? For me, commonsense tends to dictate that there are reasons to treat third parties differently from suspects. If we do not, it is a strong possibility that the Stanford Daily type search will become commonplace.

It has been said from time to time by those opposing this legislation that law enforcement officers rarely, if ever, abuse their authority to search, and that therefore it is unnecessary to legislate. Experience even in the 2 years since the Court's decision has shown us that instances

of abuse do occur. We will hear about some of those today. But beyond the evidence of abuse, we must look to the potential for abuse. Our liberties are too fragile to be assumed. I am reminded of Thomas Jefferson, writing in some alarm from his post in Revolution-torn France to the drafters of the American Constitution, when he learned that they had not included a bill of rights in the document, he warned them, "You must specify your liberties and put them down on paper." With that admonition in mind, let us get started.

OPENING STATEMENT OF HON. MAX BAUCUS, A U.S. SENATOR FROM THE STATE OF MONTANA

Senator BAUCUS. Mr. Chairman, I am pleased that today the Judiciary Committee is continuing its discussions on legislation to preserve the freedom of the press and the privacy rights of innocent citizens. I want to thank Senator Bayh and the other members of the Subcommittee on the Constitution for their diligent efforts in this area.

Recently the subcommittee reported favorably the provisions of S. 1790, the Privacy Protection Act, which give increased privacy protection to the press and others involved in public communication. This morning I am particularly interested in knowing about the concerns expressed by some over titles II and III of this bill.

Initially, I want to point out that for me, the Supreme Court's decision in *Zurcher* v. *Stanford Daily* is very close to home. As an undergraduate and law student at Stanford, I read the Stanford Daily regularly. As one might expect, I was shocked to learn about the manner in which the police searched that newspaper's offices and files.

But my experience does not end here. I was equally appalled to hear that the Associated Press newsroom in my home State of Montana was the target of the type of intrusion approved by the Court in the *Stanford Daily* case. Although the Associated Press was able to have the warrant temporarily quashed, the crucial point is that the police were on the premises ready to search AP's offices and files.

The recent decision in *Zurcher* v. *Stanford Daily* limits substantially our basic right of privacy under the Constitution. This decision raises the possibility of abusive invasions by government officials into the privacy of newsrooms, other offices and citizen's homes.

In my view, the freedom of the press and individual privacy are fundamental to our democratic system. It was a vivid memory of abusive searches and seizures that greatly influenced the adoption of the fourth amendment in 1790. Like others, I am deeply concerned about the dangers of an unrestricted power of search and seizure. For these reasons, I joined Senator Bayh last September in cosponsoring S. 1790, the Privacy Protection Act of 1979.

I believe it is essential that law enforcement officials have adequate tools to investigate and prosecute criminal activity. But, this can be done without further neglect and erosion of one of our most fundamental civil liberties. For me the question is not whether authorities should have access to confidential records relating to a criminal investigation. Rather, the only question is how authorities should go about obtaining these materials when they are in the possession of innocent third parties.

The Privacy Protection Act attempts to provide a sensible balance between the individual's right of privacy and society's interest in prosecuting criminal behavior. Importantly, our bill provides several exceptions which would allow law enforcement officials to use a search warrant to obtain evidence relating to a criminal investigation. This aspect of our bill provides a reasonable process that would preserve the ability of officials to enforce our criminal laws.

I look forward to hearing from this morning's witnesses and want to thank each one of them for being here to help us formulate the best legislation possible. I would ask at this time that the statement of the attorney general of Montana be included in the record in the appropriate place. Thank you, Mr. Chairman.

[The statement follows:]

STATE OF MONTANA,
March 26, 1980.

Hon. MAX BAUCUS,
U.S. Senate,
Washington, D.C.

DEAR SENATOR BAUCUS: Because of an inability to be personally present to testify on Senate Bill 1790, I would like to submit to you and the Senate Judiciary Committee the following comments in addition to those I have previously communicated.

In my view, Senate Bill 1790 is an overreaction to the problem presented and an attempt to alleviate unfounded and undocumented fears of privacy invasions. As I have previously stated, the proposal will not balance the needs of privacy and the effective investigation of criminal activity as the proponents of the legislation seem to believe. In shotgun fashion Senate Bill 1790 interferes with a state's right to deal with the problem locally and has, as targets of protection, relationships that have more than adequate protection now.

Title I, section 101 of Senate Bill 1790 states that, ". . . it shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense to search for or seize any work product materials possessed by a person in connection with a purpose to disseminate to the public a newspaper . . ." It appears that this section would not allow a law enforcement officer to search for or seize materials even with the consent of the person in possession of those materials. Additionally, before a government officer or employee could search for or seize materials, which by virtue of the warrant process have been determined by a magistrate to be evidence of a crime, he must determine, not where the materials are, but who the possessor is and why he posssses the materials. As a result, in a case where a person was in possession of an extortion note, or a film of a bank robbery or a written confession of a crime, his simple espousal of an intention to disseminate the contents thereof to the public would preclude a search for or seizure of the materials.

Title I, section 101 also fails to provide that work product materials may be searched for or seized when there is reason to believe that the giving of notice would result in destruction, alteration or concealment. It is vitally important to include an exigent circumstances provisions concerning work product materials if the proposed legislation is to be workable at all. There can be no valid objection to this exception by the media. If the search is authorized by the Fourth Amendment, one of the preconditions of that authorization would be a determination that what is sought is evidence. Destruction, alteration or concealment of evidence is prohibited by law now. If there is reason to believe that the giving of notice would result in the destruction, alteration or concealment of evidence of a crime, the warrant should issue. There must be some guarantee that the status quo can be maintained until the rights of the parties are determined by proper authority. Not to include an exigent circumstances provision concerning work product materials is tantamount to giving the media a license to manipulate what may be evidence of a crime. As the media is guaranteed protection, so too must preservation of evidence of a crime be guaranteed.

The exhaustion of appellate remedies provision contained in Titles I, II, and III is impractical and unrealistic. My office spent months attempting to obtain

a tape-recorded interview of a man who had shot and killed a Montana Highway Patrolman. The prosecution's case was completed prior to the time that all appellate remedies had been exhausted. The tape was not used during the trial and the defendant was acquitted.

The provisions of Title IV providing for recovery of attorney's fees should also cause some concern if the consequences of this provision are similar to those encountered with the passage of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988. Such a provision may encourage a geometric proliferation of frivolous litigation.

The definitions of "work product" and "documentary materials" in Title IV must specifically exempt evidence of a crime from protection. Documentary materials such as a confession or admission or a film of a bank robbery while not contraband, nor fruits or instrumentalities of a crime, would be evidence of a crime and should be obtainable via a search warrant.

Any legislation passed should contain a waiver provision. Once the protected materials are disseminated to the public, the protections afforded should be waived to the extent that dissemination occurs. There is no valid reason for supplying protection once communication or dissemination occurs.

I respectfully request that this letter and the attached memorandum be introduced into the record of proceedings as written testimony relating to Senate Bill 1790.

Very truly yours,

MIKE GREELY,
Attorney General.

Enclosure.

STATE OF MONTANA,
DEPARTMENT OF JUSTICE,
COUNTY PROSECUTION SERVICES BUREAU,
March 26, 1980.

MEMORANDUM

To: Mike Greely, Attorney General.
From: Marc F. Racicot, Assistant Attorney General.
Re: Senate Bill 1790—Proposed Amendments to Definitions Of Work Product, Documentary Materials, and Waiver Provision.

(1) The definitions of "documentary materials" and "work product" in section 403 of Title IV should be amended to reflect the following:

"Documentary materials", as used in this Act, means materials upon which information is recorded, and includes, but is not limited to, written or printed materials, photographs, tapes, videotapes, negatives, films, outtakes, and interview files, except those documentary materials as constitute contraband, fruits of instrumentalities or evidence of a crime.

"Work product", as used in this Act, means the matter representing the work done by a person in the possession of such material, as if the work was done by an attorney in the course of an attorney-client relationship, except such work product as constitutes contraband, fruits or instrumentalities or evidence of a crime. For purposes of Title I of this Act, "work product" means any documentary materials created by or for a person in connection with his plans, or the plans of the person creating such materials to communicate to the public.

(2) A waiver provision in the following language should also be contained in Senate Bill 1790:

"Disclosure or production by dissemination or otherwise of documentary materials or work product constitutes a waiver of the protections of this Act to the extent that the documentary materials or work product are disclosed or produced."

OPENING STATEMENT OF HON. CHARLES McC. MATHIAS, JR., A U.S. SENATOR FROM THE STATE OF MARYLAND

Senator MATHIAS. Mr. Chairman, I am pleased that the Senate Judiciary Committee is hearing testimony today on proposals to offset some of the effects of the U.S. Supreme Court's decision in *Zurcher* v. *Stanford Daily*.

In *Zurcher*, the Court ruled that warrants may issue for the search of premises owned or occupied by a person not suspected of criminal activity. Under this decision, police may obtain a warrant to search an individual's home or office if they have reason to believe that the search will uncover contraband, instrumentalities, fruits or evidence of a crime, even though the person is innocent of any wrongdoing and is unaware that the material is of interest to the authorities.

The Court's decision was not unanimous. Three justices dissented. Justice Stevens' dissent was especially persuasive. It laid bare the decision's ominous implications for personal privacy and press freedoms. He wrote:

> Countless law abiding citizens—doctors, lawyers, merchants, customers, bystanders—may have documents in their possession that relate to an ongoing criminal investigation. The consequences of subjecting this large category of persons to unannounced police searches are extremely serious. The *ex parte* warrant procedure enables the prosecutor to obtain access to privileged documents that could not be examined if advance notice gave the custodian an opportunity to object. The search for the documents described in a warrant may involve the inspection of files containing other private matter. The dramatic character of a sudden search may cause an entirely unjustified injury to the reputation of the persons searched.

In his majority opinion, Justice White took pains to note that "the fourth amendment does not prevent or advise against legislative or executive efforts to establish nonconstitutional protections against possible abuses of the warrant procedure."

That invitation was irresistable. Since May 31, 1978 when the Court handed down its decision, a wide variety of proposals has been introduced in Congress. Some of these bills would provide special procedures covering only press searches, others would cover all third parties. A few would bind only Federal agents; most would cover both Federal and State law enforcement officials.

For my part, on January 23, 1979, I introduced S. 115, the Third Party Privacy Act. This bill would establish procedures restricting searches for all nonsuspects by Federal, State and local officials. A companion bill has been introduced in the other body by Representative Railsback. My decision to offer a broad third party bill followed a careful review of all relevant material and precedent, including: The hearing record compiled by the Senate Judiciary Subcommittee on the Constitution during the 95th Congress on proposals to offset *Zurcher*; Congress constitutional authority to enact such a proposal; the legislative options available to Congress to achieve this important goal; and the first amendment, privacy, and law enforcement interests implicated by such legislation.

My review convinced me that *Zurcher* is primarily a privacy decision with implications that go far beyond its important first amendment considerations.

It may be useful to repeat here what I said when I introduced S. 115:

> The ramifications of *Zurcher* do not stop with the press. It raises the specter of police entering a non-suspect's home or office in search of evidence of a crime committed by someone else, and it also provides the means for government agents to breach the confidential relationships between doctor and patient, lawyer and client, priest and penitent.

At that time, I cited two California nonsuspect searches, one involving a lawyer's office and the other a psychiatric clinic, to illustrate the need to enact a broad third party bill. Unfortunately, nothing in the

intervening months has allayed my fears about the ramifications of *Zurcher*. Rather, incidents in California, Minnesota, and Oregon have reinforced my belief that Congress must enact a broad third party bill covering Federal, State, and local agents.

Earlier this year, the Senate Judiciary Subcommittee on the Constitution, under the leadership of Senator Bayh, reported to this committee a *Zurcher* bill covering searches by Federal, State, and local law enforcement authorities of individuals engaged in certain first amendment activities. The fundamental issue now facing this committee is whether or not this proposal should be expanded to cover all non-suspect searches. This issue will be the focal point of today's hearings.

The answer to this question will turn in part on Congress' perception of its constitutional authority to offset the effects of *Zurcher*. We must consider with great care whether or not we can enact legislation imposing upon the States special protections that the Court in *Zurcher* found were not compelled by the 1st, 4th, and 14th amendments. In answering this question in the affirmative, I have been especially impressed with the testimony received in the 95th Congress by the Senate Judiciary Subcommittee on the Constitution from two leading constitutional scholars, Prof. Paul Bender of the University of Pennsylvania School of Law and Prof. William Cohen of the Stanford Law School. I commend their remarks to my colleagues.

Mr. Chairman, it is almost 2 years since the Supreme Court handed down *Zurcher*. Since then, much time and thought and effort have gone into drafting an appropriate legislative response to the Court's pronouncement. Much progress has been made. This committee and its counterpart in the House each has a *Zurcher* bill before it. I am confident that in the remaining months of the 96th Congress, we will complete this process and send to the President a bill restricting surprise searches of all innocent parties. For, as the Baltimore Sun has observed concerning the need for a broad legislative response to *Zurcher*, "that's what the fourth amendment is all about."

[The bills, S. 115, S. 1790 and S. 1816 follow:]

96TH CONGRESS
1ST SESSION

S. 115

To establish procedures for the issuance and enforcement of search warrants and other legal processes, to provide a remedy for persons injured by a failure to comply with such procedures, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JANUARY 23 (legislative day, JANUARY 15), 1979

Mr. MATHIAS introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To establish procedures for the issuance and enforcement of search warrants and other legal processes, to provide a remedy for persons injured by a failure to comply with such procedures, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Third Party Privacy Act of 1979".

ISSUANCE OF WARRANT OR OTHER LEGAL PROCESS

SEC. 2. (a) Except as provided in section 3, no warrant shall be issued to search for and seize any matter in the possession or control of a third party.

(b) Except as provided in section 3, no court or magistrate shall issue any order or legal process which directs a third party to produce any matter in such party's possession or control unless—

(1) the law of the jurisdiction in which such order or legal process is issued permits the party to whom the order is directed to obtain an adversary hearing before a court prior to the enforcement of the order; and,

(2) at such adversary hearing, the order or legal process will be quashed unless the court determines (i) that the issuance and enforcement of such order or legal process is authorized by law; and (ii) that no privilege or legal grounds exist that justify the refusal to produce the matter.

(c) Nothing in this section shall prohibit the party in possession or control of such matter from voluntarily complying with an order or legal process pursuant to subsection (b) of section 2 if such party is adequately informed by the language of the order or legal process or other written means at the time of the service of the order or legal process, of the

party's right to notice and hearing under subsection (b) and such party knowingly and voluntarily waives any right to such notice and hearing.

GROUNDS FOR EX PARTE ISSUANCE

SEC. 3. The provisions of this Act do not prevent a judge or magistrate from issuing ex parte a warrant or other legal process to search for and seize or compel the production of any matter in the possession or control of a third party in any case in which the applicant for the warrant or other legal process shows—

(a) upon his personal knowledge or that of another present before the judge or magistrate that there is probable cause to believe that if an order or legal process is issued in accordance with subsection (b) of section 2 such matter will be destroyed, altered, or put beyond the control or the jurisdiction of the court; or

(b) that there is probable cause to believe that the matter is contraband.

REMEDIES AND DEFENSES

SEC. 4. (a) Any unit of Federal, State or local government which, and every person who, under color of any statute, ordinance, regulation, custom, or usage of the United States, any State or territory, or of the District of Columbia, subjects or causes to be subjected, any person within the jurisdiction thereof to the deprivation of any right under this

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Act shall be liable to such person in an action for legal or equitable relief, or other proper proceeding for redress.

(b) Each unit of Federal, State, or local government shall be jointly and severally liable with any officer, employee, agent, or other person clothed with the authority of such unit for any violation of this Act.

(c) It shall not be a defense for such unit that the officer, employee, agent, or other person clothed with the authority of such unit is personally immune from liability under this Act by virtue of a common law or statutory immunity or defense attached to such officer, employee, agent or other person clothed with the authority of such unit.

(d) In any action brought under this Act, the court shall award such special or general damages as may be appropriate, as well as punitive damages not to exceed $1,000 for each violation, and may award a reasonable attorney's fee and other actual and reasonable expenses incurred in connection with such action.

DEFINITIONS

SEC. 5. (a) For purposes of sections 2 and 3, a "third party" is a person whom there is no probable cause to believe has committed the crime to which the matter sought relates.

(b) For purposes of section 3, "contraband" means goods or merchandise the importation, exportation, or posses-

sion of which is prohibited under the laws of the State in which the warrant or order is issued or of the United States.

(c) For purposes of section 4—

(1) "person" means any natural person, or any partnership, corporation, association, or other legal entity organized under the laws of the United States, of any State, or of the District of Columbia;

(2) "unit of Federal, State, or local government" means the United States or any agency, department, or instrumentality thereof other than the Congress; any State or territory; or any agency, department, or instrumentality thereof, other than the legislature; any municipality, county, parish, or other State, territorial, or local governmental subdivision, or agency, department, or instrumentality thereof; or the District of Columbia or any agency, department, or instrumentality thereof.

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96TH CONGRESS
1ST SESSION

S. 1790

Entitled the "Privacy Protection Act of 1979".

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 21 (legislative day, JUNE 21), 1979

Mr. BAYH (for himself and Mr. BAUCUS) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

Entitled the "Privacy Protection Act of 1979".

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Privacy Protection Act of 1979".

TITLE I—FIRST AMENDMENT PRIVACY PROTECTION

SEC. 101. (a) Notwithstanding any other law, it shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize any work product materials possessed by a

person in connection with a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce; but this provision shall not impair or affect the ability of any government officer or employee, pursuant to otherwise applicable law, to search for or seize such materials, if—

(1) there is probable cause to believe that the person possessing the materials has committed or is committing the criminal offense for which the materials are sought: *Provided, however,* That a government officer or employee may not search for or seize materials described in subsection 101(a) under the provisions of this paragraph if the offense for which the materials are sought consists of the receipt, possession, communication, or withholding of such materials or the information contained therein (but such a search or seizure may be conducted under the provisions of this paragraph if the offense consists of the receipt, possession, or communication of information relating to the national defense, classified information, or restricted data under 18 U.S.C. 793, 18 U.S.C. 794, 18 U.S.C. 797, 18 U.S.C. 798, 42 U.S.C. 2274, 42 U.S.C. 2275, 42 U.S.C. 2277, or 50 U.S.C. 783); or

(2) there is reason to believe that the immediate seizure of the materials is necessary to prevent the death of or serious bodily injury to a human being.

(b) Notwithstanding any other law, it shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize documentary materials, other than work product, possessed by a person in connection with a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce; but this provision shall not impair or affect the ability of any government officer or employee, pursuant to otherwise applicable law, to search for or seize such materials, if—

(1) there is probable cause to believe that the person possessing the materials has committed or is committing the criminal offense for which the materials are sought: *Provided, however,* That a government officer or employee may not search for or seize materials described in subsection 101(b) under the provisions of this paragraph if the offense for which the materials are sought consists of the receipt, possession, communication, or withholding of such materials or the information contained therein (but such a search or seizure may be conducted under the provisions of this para-

graph if the offense consists of the receipt, possession, or communication of information relating to the national defense, classified information, or restricted data under 18 U.S.C. 793, 18 U.S.C. 794, 18 U.S.C. 797, 18 U.S.C. 798, 42 U.S.C. 2274, 42 U.S.C. 2275, 42 U.S.C. 2277, or 50 U.S.C. 783); or

(2) there is reason to believe that the immediate seizure of the materials is necessary to prevent the death of or serious bodily injury to a human being; or

(3) there is reason to believe that the giving of notice pursuant to a subpena duces tecum would result in the destruction, alteration, or concealment of the materials; or

(4) the materials have not been produced in response to a court order directing compliance with a subpena duces tecum, and

(A) all appellate remedies have been exhausted; or

(B) there is reason to believe that the delay in an investigation or trial occasioned by further proceedings relating to the subpena would threaten the interest of justice. In the event a search warrant is sought pursuant to this subparagraph, the person possessing the materials shall be afforded adequate opportunity to submit an affidavit

setting forth the basis for any contention that the materials sought are not subject to seizure.

TITLE II—CONFIDENTIAL INFORMATION PROTECTION

SEC. 201. (a) Notwithstanding any other law it shall be unlawful for a governmental officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize any documentary material or work product that would be considered by the jurisdiction of the person in possession of the materials to be privileged material under that jurisdiction's statutory or case law. This provision shall not impair or affect the ability of any governmental officer or employee pursuant to otherwise applicable law to search for or seize materials if—

(1) there is probable cause to believe that the person possessing the materials has committed or is committing the criminal offense for which the materials are sought; or

(2) there is reason to believe that the immediate seizure of the materials is necessary to prevent the death of or serious bodily injury to a human being; or

(3) there is reason to believe that the giving of notice pursuant to a subpena duces tecum would result in the destruction, alteration, or concealment of materials; or

(4) the materials have not been produced in response to a court order directing compliance with a subpena duces tecum, and

(A) all appellate remedies have been exhausted; or

(B) there is reason to believe that the delay in an investigation or trial occasioned by further proceedings relating to the subpena would threaten the interests of justice. In the event a search warrant is sought pursuant to this subparagraph, the person possessing the materials shall be afforded adequate opportunity to submit an affidavit setting forth the basis for any contention that the materials sought are not subject to seizure.

TITLE III—CITIZENS PRIVACY PROTECTION

SEC. 301. (a) Notwithstanding any other law, it shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize any documentary or work product materials possessed by any person, but this provision shall not impair or affect the ability of any government officer or employee, pursuant to otherwise applicable law, to search for or seize such materials, if—

(1) there is probable cause to believe that the person possessing the materials has committed or is

committing the criminal offense for which the materials are sought; or

(2) there is reason to believe that the immediate seizure of the materials is necessary to prevent the death of or serious bodily injury to a human being; or

(3) there is reason to believe that the giving of notice pursuant to a subpena duces tecum would result in the destruction, alteration, or concealment of the materials; or

(4) the materials have not been produced in response to a court order directing compliance with a subpena duces tecum, and

(A) all appellate remedies have been exhausted; or

(B) there is reason to believe that the delay in an investigation or trial occasioned by further proceedings relating to the subpena would threaten the interests of justice. In the event a search warrant is sought pursuant to this subparagraph, the person possessing the materials shall be afforded adequate opportunity to submit an affidavit setting forth the basis for any contention that the materials sought are not subject to seizure.

TITLE IV—REMEDIES, EXCEPTIONS, AND DEFINITIONS

SEC. 401. This Act shall not impair or affect the ability of a government officer or employee, pursuant to otherwise applicable law, to conduct searches and seizures at the borders of or at international points of entry into the United States in order to enforce the customs laws of the United States.

SEC. 402. (a) A person aggrieved by a search for or seizure of materials in violation of this Act shall have a civil cause of action for damages for such search or seizure—

(1) against the United States, against a State which has waived its sovereign immunity under the Constitution to a claim for damages resulting from a violation of this Act, or against any other governmental unit, all of which shall be liable for violations of this Act by their officers or employees while acting within the scope or under color of their office or employment; and

(2) against an officer or employee of a State who has violated this Act while acting within the scope or under color of his office or employment, if such State has not waived its sovereign immunity as provided in paragraph (1). It shall be a complete defense to a civil action brought under this paragraph that the officer or

employee had a reasonable good faith belief in the lawfulness of his conduct.

(b) The United States, a State, or any other governmental unit, liable for violations of this Act under paragraph 402(a)(1), may not assert as a defense to a claim arising under this Act the immunity of the officer or employee whose violation is complained of or his reasonable good faith belief in the lawfulness of his conduct, except that such a defense may be asserted if the violation complained of is that of a judicial officer.

(c) The remedy provided by paragraph 402(a)(1) against the United States, a State, or any other governmental unit is exclusive of any other civil action or proceeding for conduct constituting a violation of this Act, against the officer or employee whose violation gave rise to the claim, or against the estate of such officer or employee.

(d) A person having a cause of action under this section shall be entitled to recover actual damages but not less than liquidated damages of $1,000, such punitive damages as may be warranted, and such resonable attorneys' fees and other litigation costs reasonably incurred as the court, in its discretion, may award: *Provided, however,* That the United States, a State, or any other governmental unit shall not be liable for interest prior to judgment.

(e) The Attorney General may settle a claim for damages brought against the United States under this section, and shall promulgate regulations to provide for the commencement of an administrative inquiry following a determination of a violation of this Act by an officer or employee of the United States and for the imposition of administrative sanctions against such officer or employee if warranted.

(f) The district courts shall have original jurisdiction of all civil actions arising under this section.

SEC. 403. (a) "Documentary materials", as used in this Act, means materials upon which information is recorded, and includes, but is not limited to, written or printed materials, photographs, tapes, videotapes, negatives, films, outtakes, and interview files.

(b) "Work product", as used in this Act, means the matter representing the work done by a person in possession of such material, as if the work was done by an attorney in the course of an attorney-client relationship, except such work product as constitutes contraband or the fruits of instrumentalities of a crime. For the purposes of title I of this Act, "work product" means any documentary materials created by or for a person in connection with his plans, or the plans of the person creating such materials to communicate to the public.

(c) "Any other governmental unit", as used in this Act, includes the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, and any local government, unit of local government, or any unit of State government.

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96TH CONGRESS
1ST SESSION

S. 1816

To assure the rights of citizens under the fourth and fourteenth amendments and to protect the freedom of the press under the first amendment, and for other purposes.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 25 (legislative day, JUNE 21), 1979

Mr. NELSON introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To assure the rights of citizens under the fourth and fourteenth amendments and to protect the freedom of the press under the first amendment, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Privacy Protection Act of 1979".

SEC. 2. Notwithstanding any other law, and except as provided for in section 3, it shall be unlawful for any State, Federal, or local government officer, employer, agent, or other person clothed with the authority of such government,

in connection with the investigation or prosecution of a criminal offense to obtain a warrant to search for or seize any matter in the possession or control of any person whom there is no probable cause to believe has committed or is an accessory to the crime to which the matter sought relates. Such matter shall be sought as evidence only through a subpoena duces tecum.

SEC. 3. Notwithstanding section 2 of this Act; a warrant may issue if:

(1) there is probable cause to believe the matter sought to be seized would be destroyed, hidden, or moved if the procedures set out in section 2 were followed; or

(2) there is probable cause to believe that the matter is contraband; or

(3) the identity of the person in possession or control of the matter sought cannot be determined within a reasonable time with reasonable effort.

SANCTIONS

SEC. 4. (a) Evidence obtained in violation of this Act shall not be admissible in any court.

(b) Any unit of Federal, State, or local government, and every person who, under color of any statute, ordinance, regulation, custom, or usage of the United States, any State or territory, or of the District of Columbia, subjects or causes to

be subjected, any person within the jurisdiction thereof to the deprivation of any right under this Act shall be liable to such person in an action for legal or equitable relief brought in an appropriate United States district court.

(c) Each unit of Federal, State, or local government shall be jointly and severally liable with any officer, employee, agent, or other person clothed with the authority of such unit for any violation of this Act.

(d) It shall not be a defense for such unit that the officer, employee, agent, or other person clothed with the authority of such unit is personally immune from liability under this Act by virtue of a common law or statutory immunity or defense attached to such officer, employee, agent, or other person clothed with the authority of such unit.

(e) In any action brought under this Act, the court shall award such special or general damages as may be appropriate, as well as punitive damages not to exceed $1,000 for each violation, and may award reasonable attorney's fees and other actual and reasonable expenses incurred in connection with such action.

DEFINITIONS

SEC. 5. (a) For purposes of section 2, "accessory" means one who, without being present at the commission of a crime, becomes guilty of the crime, not as a chief actor, but

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as a participator, as by command, advice, instigation, or concealment; either before or after the commission of the crime.

(b) For purposes of section 3, "contraband" means goods or merchandise the importation, exportation, or possession of which is prohibited under the laws of the State in which the warrant or order is issued or of the United States.

(c) For purposes of section 4—

(1) "person" means any natural person, or any partnership, corporation, association, or other legal entity organized under the laws of the United States, of any State, or of the District of Columbia;

(2) "unit of Federal, State, or local government" means the United States or any agency, department, or instrumentality thereof, other than the Congress; any State or territory; or any agency, department, or instrumentality thereof, other than the legislature; any municipality, county, parish, or other State, territorial, or local governmental subdivision, or agency, department, or instrumentality thereof; or the District of Columbia or any agency, department, or instrumentality thereof.

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Senator BAYH. I would just like to point out in summary that we hope to be able to conclude a study that this committee has undertaken in some detail since the Supreme Court decision.

Often in the case of a democratic society such as ours there are significant conflicts of interest that need to be balanced in the general public interest. Law enforcement, first amendment rights are two of the most consistent kinds of rights that we have tried to balance delicately throughout the history of this country. Sometimes we tilted one way and sometimes we tilted the other.

It was new ground for the Supreme Court to suggest that warrants could suffice in instances where prior to that time subpenas had appeared to have been required.

We are concerned, this committee, and I, as the chairman, about the need of law enforcement agencies to protect society generally. We cannot be naive about the fact that there are people who would prey and are preying on society. Our citizens have a right to be protected.

They also have a right to be protected from the Government itself.

There is an increasing concern, I think, over the size of Government involvement in our lives and incidents of Government involvement in our lives that go far beyond the immediate question before us. The size of the tax burden, the size of the bureaucracy, the size of the budget, the number of Federal, State, and local employees are just some of these concerns.

The police power in question here today is a different kind of growth in size, but I think it is probably more insidious than the others if indeed, it cannot be carefully checked to those instances where it is necessary and avoided completely where it is not.

I would like to emphasize that what we are talking about here is the right of our Government to invade the home or office of innocent parties. I am not talking about people who have committed or are under suspicion of having committed a crime. We are talking about innocent parties.

It seems to me that going clear back to common law the personal privacy of citizens has been protected. William Pitt once said that, "The poorest man in his cottage may bid defiance to all the forces of the crown. It may be frail, its roof may shake, the wind may blow through it, the storm may enter, but the King of England cannot enter."

That was even before our Bill of Rights. The bill before us is a significant step in reassuring these rights. I am sure that our witnesses today will help us to more clearly define the balance. They are not strangers before this committee or on this issue.

I just note one particular matter of concern. I have felt concerned about all third parties. However, I think we recognize that in our society the press has a particular role, a particular responsibility, if I may suggest, a responsibility to inform the people of this country so they can make intelligent decisions.

It is even more important for us to carefully weigh the damage, the chilling effect that such an invasion of the homes and offices of members of the Fourth Estate may have on the ability of a free and unfettered press to fulfill its responsibilities of informing the people of this country what is happening around them.

We are fortunate this morning to have three distinguished witnesses, Mr. Philip B. Heymann, Mr. Oliver B. Revell III, and Mr. Roger Pauley. All three come with significant experience in this area. Mr. Heymann, of course, plays a significant role, as does Mr. Pauley, at the Department of Justice; Mr. Revell, the FBI organized crime unit. So, we appreciate very much your being here with us. Mr. Heymann, why don't you start off here this morning.

TESTIMONY OF PHILIP B HEYMANN, ASSISTANT ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE; OLIVER B. REVELL III, DEPUTY ASSISTANT DIRECTOR, FBI; AND ROGER PAULEY, DIRECTOR, OFFICE OF LEGISLATION, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. HEYMANN. Thank you Mr. Chairman.

If you, Mr. Chairman, will assure me that you will come out our way on this issue, I will agree not to read my statement in full.

Senator BAYH. Well, I hate to make assurances. I think that perhaps my good friend is capable of assessing what his role is here. Perhaps I should say, knowing the way this committee operates, I can't promise that even if you read it, it will come out your way. [Laughter.]

We are going to do our best to resolve this very vexacious problem. I think you understand we want to cooperate and you want to cooperate and we are going to do our best.

Mr. HEYMANN. In that spirit, I will waive reading the entire statement if it is simply put in the record.

Senator BAYH. Fine. Your statement will appear in the record, at the conclusion of your oral testimony.

Mr. HEYMANN. Mr. Chairman, I would like to talk a little bit about titles I and IV of your bill, which correspond to the proposals the administration has made, and then focus in sharply on the question of third parties.

The history of this proposal, the history of the legislative response to *Stanford Daily* is already becoming too long. I spoke, in the stead of the Attorney General, to a group of about 1,000 reporters from around the country a few months ago, and I made my subject I think "A Requiem on the Death of a Very Good Proposal."

I think the history is becoming long. I wonder whether as time goes on, the chances of our getting something here aren't diminishing.

Senator BAYH. If I might just interrupt, I don't think so.

Mr. HEYMANN. I sincerely hope we can come out with something.

Senator BAYH. We just must reconcile our differences and move forward here. I can't speak for the whole committee, but I sense a good faith determination on the part of all of us to come forth with something here. We want it to be something rather than nothing.

Mr. HEYMANN. As the chairman knows, the administration itself has proposed a first amendment bill. When we call it a first amendment bill we mean that we think we have something as broad as the first amendment, broader than press or anything thought of as orga-

nized press; something as broad as all first amendment rights, scholars, pamphleteers, speakers, on most occasions, private, public, people who will never succeed in publishing, and those who publish every day.

We think we have created somthing as broad as the first amendment in the way of protection against the particular dangers of search. None of these bills deal with whatever the present situation is with regard to subpenas, except for Senator Mathias' bill.

We aren't ashamed or unhappy to have what is "only" a first amendment bill. The first amendment was big enough in itself to be an amendment written by the framers of the Bill of Rights, and indeed, it was big enough to be made the first of the amendments.

It doesn't embarrass us that it is not also a fourth amendment bill.

There are a number of reasons why the first amendment plays out differently for us in terms of law enforcement concern. In other words, the first amendment is a particular source of national concern for its protection and was made the first amendment by the framers of the Constitution, and therefore, we like protecting it particularly.

It is also true that as a matter of law enforcement interest, a first amendment bill just works out considerably more satisfactorily than a bill that goes more broadly.

The reasons for that, which are spelled out at great length in my statement are that the press generally holds materials and collects materials for publication and the press creates its own record of information.

For both of those reasons, it turns out that in law enforcement terms one doesn't sacrifice very greatly by taking a hands-off-the-press position.

In other words, I have so far mentioned two reasons why a first amendment bill is something that looks much better than a broader bill to us.

One, it focuses in on a crucial problem.

Two, it works out because it protects first amendment rights in a way that does not interfere substantially with law enforcement, and there is a third reason.

The third reason is that it provides the Congress with a constitutional handle stronger than those that are available in other areas.

On the House side, for example, we see an all third parties proposal emerging from Congressman Kastenmeier's subcommittee which is limited to Federal officials.

Now there may be reasons of constitutional dimension to limit an all third party protection to Federal officials, yet it strikes me as ultimately a mistake, ultimately a false note. There are no recorded problems with regard to Federal searches of third parties for documentary materials. There are only a few with regard to States. But to provide that only the Federal Government which has not been a source of problems will be covered by a bill simply because that is all that can be reached by the Constitution comfortably as the House bill does, is at the same time to hold out a false promise to those who are concerned about the privacy interests of searches, and to impose limitations on the only governmental authority as to which there is no problem.

Well, those are three reasons why we ended up with a first amendment bill.

I don't think I ought to take your time to go through how it works, because we have done that before. It has been spelled out.

The only thing I would like to mention about that, Mr. Chairman, is that ours is the only bill that I believe at present doesn't allow searches even for people suspected of committing a crime, if the crime they are suspected of committing is involvement in the theft of information.

We have gone a little bit further than I believe any of the bills in either House, I could be mistaken on that, but I believe all those bills allow searches if the person searched is thought to be a suspect of a crime, including yours.

Ours goes a little further and grants additional protection and says even if the person is a suspect, that person cannot be searched if the crime he is suspected of committing is theft of information.

Senator BAYH. Outright theft, not receiving stolen goods.

Mr. HEYMANN. Or receipt of stolen documents.

Senator BAYH. It seems to me that there is a difference, Mr. Heymann.

Mr. HEYMANN. There is a difference. We cover both. We say that is not a crime which justifies search under our bill. You are quite right to add that in, Mr. Chairman, either receipt or theft of stolen property. We go a little bit further than anybody else goes in protecting everybody associated with a first amendment.

Senator BAYH. With all respect, I do not believe that we should put a reporter in jail because he is in possession of information that has been stolen by someone else. But to suggest that, just because reporters happen to be performing an important function, they should be granted immunity from searches when participating in burglary and theft information, is going pretty far.

Mr. HEYMANN. Well, we don't grant immunity from being charged with theft of information or possession of stolen property, though the Federal Government never does that.

What we do is say, that isn't sufficient justification for searching a home or office of a reporter. Incidentally, that attempt to grant additional protection has caused us more unhappiness than happiness as an executive branch, because, having granted additional protection, we did not eliminate cases involving violation of the espionage laws.

I think I ought to move to the question of third parties, Mr. Chairman.

The bills that we have before us, including Senator Mathias', the chairman's, and others, sometimes are addressed to privileged groups, doctors, lawyers, perhaps accountants; sometimes they address all third parties. Your bill, Mr. Chairman, of course, has a provision which includes all third parties and another that includes only privileged groups; I assume with an intention that in one way or another the committee would choose between them. I think the broader one covers the narrower one completely.

We are, as an executive branch, strongly opposed to all third party bills. Let me see if I can explain why and respond to questions.

Of course, Buck Revell, on my right, will want to say why, too.

The fact of the matter is that in one way or another law enforcement, local, State, or Federal, has to be able to get evidence of crimes wherever it is located. That much is not disputed. All the bills we are talking about say we must subpena rather than proceed by a search warrant, unless we think the evidence is going to be destroyed.

But the location of the evidence can never be made a crucial determinant of whether law enforcement can have it. That is the starting place, because otherwise the crooks can simply put the evidence in whatever place you say could never be reached. You can't allow that for they would promptly do just that.

Now the bills that have been offered in this committee and on the House side, generally say, if we are not dealing with a suspect, somebody suspected of a crime themselves, we must subpena the evidence from them if we think the evidence is in their possession. The bills state we may not go in with a search warrant, knocking on the door, presenting a search warrant and say, "Turn it over or we'll search." We must subpena it, unless we have reason to believe that it is going to be destroyed or concealed or somehow or other put out of the reach of law enforcement.

The problem with that, when you look at it hard, seems to me to be very real. Let me give you a hypothetical that isn't unrealistic. Buck Revell will give you real cases. But the hypothetical has the advantage of being extremely simple.

Assume that you have an organized crime figure who has a list of people to whom he has paid money for "hits," or assassinations. Such lists occasionally exist and occasionally come up. A famous one, I don't know whether it was true or not, was thought up in the Jonestown, Guyana killings.

Assume that the organized crime figure, with an accounting list of whom he had paid for "hits," simply gives the list to his sister to keep for him; a most natural thing to do. I want to know what we are supposed to do if we know that the sister has the list.

Do you want an example a touch more dramatic? As we are approaching the organized crime figure's house looking for the list, to search the suspect, the organized crime figure crosses the street and hands the list to his sister, who puts it in her pocketbook and takes it into her house. We know for sure it is there. It is crucial evidence. It is important evidence.

Now let me walk you through what our problems are, if I may, Mr. Chairman.

Our first problem is that we don't have any evidence to indicate that the sister is going to destroy that list. All we know is that she is the sister of the organized crime figure.

We assume that those who have sponsored these bills did not mean that we were entitled to search for a list of payments for hits simply on the basis that it was in the custody of a sister, brother, husband, wife, parent, child, law partner, medical partner, close associate, business associate, or friend.

We assume that if you put in a statute that we have to have probable cause or—some say—reason to believe that the matter is going to be destroyed, you mean something more substantial than simply saying

it happens to be the organized crime boss' sister or brother, or father, or child, or mother, or partner.

We assume you mean that we have to show something more than that. Now this is very important to us, because the fact of the matter is the people who hold documentary or other evidence for a crook, the people with whom a crook will stash, place, store evidence are always people in an intimate business or personal relationship. That is where one would put personal, sensitive, incriminating papers.

If you say to us, "No, Mr. Heymann, you are free to search as soon as you point out that it is the sister," we could perhaps live with that, if proof that the third party was a sister, brother, prior accomplice, former partner, close friend, father, or child was sufficient.

As soon as you say the relationship is all, perhaps we could live with that, but that would encompass nearly every case. I don't think you mean that, because you would be perpetrating a monstrous fraud on those who would think that you were providing real protection, for everybody who will end up holding documentary evidence fits into that class of close associates that we fear will destroy documentary evidence. That relationship is why they were given the evidence, to keep it in a safe place.

So, we have a very real law enforcement interest. We don't have a substantial interest if you tell us the fact of such a relationship is enough for us to search. If you tell us no, you have to have something more than the type of relationship, we are going to find in every single case that we have a real problem.

Senator BAYH. May I just interrupt to point out, I think the drafters of our legislation recognize that problem. I would assume, in a situation like that, that you have a hit list where the fellow has a list of people that he has paid money to that are going to go out and murder people, that it would fall under the second exception which says there is reason to believe that the immediate seizure of the material is necessary to prevent the death or serious bodily injury of a human being.

Mr. HEYMANN. It would, but I meant to suggest, and I wasn't clear enough, Mr. Chairman, a hit list of people who had been paid for prior hits, no future danger. Nobody on the list for the future.

Senator BAYH. Then I would assume that if it were a sister you could make a pretty good case to a judge that it would fall under the third exception which has to do with the destruction, alteration, or concealment of the material.

Mr. HEYMANN. I am saying, Mr. Chairman, that if you mean for us to be able to proceed by search, on no other basis than to say the documents are in the hands of a sister or a friend or a cousin, there is no real protection there if you mean to create a privacy protection, because that will be every case or almost every case.

Yes, I agree with you. The sister will destroy, the cousin will destroy, the friend will destroy, at least a significant number of times, in a high percentage of cases. That is what concerns us.

If you want us to go further, if you want us to show something more than it is simply a cousin who possesses the property of an old friend or someone who was formerly in an illegal business with the suspect we have two problems. One, sometimes we are not going to be able to go further or show more; and two, where we will be able to, you will be

asking us to do a strange thing in terms of protection of privacy. You will be asking us to explore whether the two cousins are close and friendly; whether there is trust; whether there is something like love between the two cousins.

You are going to be asking us to explore these relationships in order to protect privacy. It doesn't seem to us that there is much point in sending FBI agents out to ask questions of neighbors about the relationship between a sister and a brother.

So, if you want us to do more than to name the relationship, we think you are not serving the cause of privacy and we think we will often fail and there will be a law enforcement cost.

If you want us simply to name the relationship and note that it is a sister, then we think that there is a promise of protection being set forth here that isn't real, because there is always that type of relationship.

We would worry that the courts would not accept the very law enforcement-oriented construction that any relationship that could well lead to destruction is enough.

I want to stop and let Buck Revell say something and let the committee ask questions. Those problems seem to us to be very real and we read the law I think differently from what I believe you said at the beginning, Mr. Chairman, though I am not sure.

We think the law has always been, from the time of the start of the country, and before, as you were going back to prior to the start of the country with William Pitt that one can search the place where evidentiary materials are located.

We don't think that the law of search has ever been tied to the person of the suspect. It has never been. We don't think that the law has ever been in the history of the country that somehow or other some one shouldn't be searched simply because although what he possesses can legally be seized—contraband, instrumentalities of fruits or evidence of a crime—he is not a suspect.

We don't think the law has ever forbidden search on that basis. We think the law has always been that the basis of a search is the Government's right, after knocking on the door and after presenting the warrant, to go into a place where something is stashed or held or possessed, and demand that it be turned over. That is what the warrant says.

We don't think it has anything to do with suspects. If you like, we think the law has always been that if there were a serious crime and the evidence were stashed all over the place and the suspect were in Siberia, we would think we have a perfect right, and this has always been the case, to get warrants, knock on the door, present the warrant to the person at the door, state, "This entitles us to seize the following, for the following crime," even though the suspect is 5,000, 10,000 miles away.

Let me just conclude. We think first amendment is the right notion. We are not embarrassed by a first amendment bill. The framers weren't embarrassed to make the first amendment, the first amendment.

We think there are serious law enforcement problems with going further. There are serious law enforcement problems, unless together, we agree that we will fool the American public, unless we together agree that we will defraud those who are concerned about privacy.

We think that the law enforcement problems have never been shown to be real in terms of any problem with third party searches by the Federal Government. We think the situation has existed for 200 or more years, which is ample time to show that we have done something wrong.

With that, I think I ought to give you Buck Revell, Mr. Chairman. Thank you.

Senator BAYH. I would just like to emphasize, I don't think any of us who are supporting this legislation are impugning the motives of doing something wrong in the street sense, you understand.

Mr. HEYMANN. No, but we don't have a Federal record of improper third party searches. Perhaps you will surprise me, or somebody on the committee will surprise me and say, "I'd like to tell you about the following four outrageous Federal searches," but I haven't heard it yet.

Senator BAYH. We are thinking really about setting an example by Federal rules and regulations that the State and local police authorities will follow up on. I believe problems have existed as far as local and State police authority is concerned.

Mr. HEYMANN. That's true.

Senator BAYH. I understand you get into a constitutional question there.

Mr. HEYMANN. It hasn't been a momentous problem but it has been a cause of concern and controversy. There hasn't ever been any concern and controversy in this area with the Federal Government.

But, Buck Revell will go on. If Buck Revell disagrees with me, then I am wrong.

Senator BAYH. Fine.

Mr. Revell.

Senator MATHIAS. How are we going to go for questions? I just can't wait.

Senator BAYH. Let's let the witnesses conclude.

Senator MATHIAS. Very well.

Senator BAYH. I will try to wait.

Mr. REVELL. Mr. Chairman, I very seldom disagree with Professor Heymann. And, when I do, we usually do it in private, but there are some issues that concern the FBI, and I think would concern other Federal law enforcement agencies, particularly in titles II and III.

My particular responsibility in the FBI is to coordinate and direct organized crime, white collar crime, official corruption, and undercover operations.

It is exactly these areas of our highest priority that I personally feel and that the members of the staffs of these particular entities in the organization feel would be most difficult to enforce under titles II and III.

We certainly perceive the reasoned debate that has gone into the drafting of these two titles. We understand the concern that would be raised as to searches of so-called innocent third parties.

As Professor Heymann has said, there is no track record of any such activities on the part of the Federal Government. However, there certainly is a track record on the part of organized crime in using every loophole, every deceitful means, every legal tactic to conceal their illicit activities.

Certainly the infiltration of legitimate business is one of the most profound and disturbing aspects of organized crime in America today.

I think this committee is very well aware of the organized crime infiltration, control, and direction of gambling casinos. That is simply an example of what can happen by the use of fronts, of associates, friends, and relatives to carry on the activities of an illicit organization, which can give very difficult problems in penetration, even under the rules of search and seizure and the law to date.

I think titles II and III would unquestionably give a further degree of sanctuary to the organized criminal entities. They would certainly also do the same for international con men and swindlers who we see today involved in literally millions of dollars in advance fee schemes, utilizing many times, offshore banks, which are generally beyond our reach, and the use of documents and fraudulent, forged, and counterfeit instruments to perpetrate fraud. It is a substantial problem to the citizens of the United States.

Our searches are always conducted in a manner that is prescribed by law and regulation. It is a very difficult procedure for an agent to obtain a search warrant.

First, he must develop probable cause.

Second, he must obtain supervisory authority to request a warrant.

Third, it must be reviewed in-house by a special agent attorney.

Fourth, it must be reviewed and approved by an assistant or a U.S. attorney, or strike force attorney.

And, then, of course, it must go before a judicial officer where the whole test is repeated and then we must execute it under very specific regulations.

All of these things I think contribute to the fact that where available and where we have a reasonable belief that we will obtain information by subpena, we will always utilize a subpena first.

There are two problems with this. First, a subpena is not available to us in many cases. We must have a sitting grand jury that is considering the case or the activity under question to avail to us the opportunity to obtain a subpena.

FBI agents and other Federal agents do not have subpena power; neither does the U.S. attorney. We must utilize a grand jury, and it must be considering the activities or at least be sitting and concerned with the activities that we would seek a subpena for.

In the second area, we have a real problem because the subpena does not have a true forthwith requirement. We would not have the availability of the evidence that is needed immediately, and could go through a long litigation process where the evidence is needed to stop an ongoing crime. This will give us severe problems.

In essence, our two objections are that it would create a sanctuary, and, two, that it would form an independent group of evidence; namely, documentary evidence, make it a special class, subject to different rules, when it is in essence documentary evidence we need to seize to counter both organized and white-collar crime.

We believe our track record is good in protecting the rights of individuals in the area of search and seizures, and while we certainly concede that the title II and III, are well intended, we feel they are

unnecessary and would definitely be an impediment to our law enforcement functions.

Senator BAYH. Thank you very much.

Let me just ask a couple of questions, and then I know Senator Baucus and Senator Mathias are anxious to ask some.

Mr. Revell, does the FBI now search attorneys' offices and doctors' offices?

Mr. REVELL. Only when we have reason to believe, one, there is evidence which we can obtain by a search warrant, two, when we would determine there is unlikely to be compliance with a subpena, if a subpena is available to us.

There are instances, as I indicated, when we have no subpena power available, and when the doctor or lawyer would not want to turn over to us, on an informal request basis, but would accede voluntarily on a warrant basis, in other words, to protect his liability and also to protect his relationship.

So, yes sir, there are occasions when we would execute a search warrant against a doctor, lawyer, accountant and so forth to obtain evidence, but we would do so only if it was the only alternative available to us.

Senator BAYH. How many times would you do this say in a year?

Mr. REVELL. I have absolutely no idea; it would be infrequent.

Senator BAYH. Well, if it is going to have such a devastating impact, on law enforcement for us to have that title in there, I would think you ought to be able to tell us how many times you have been able to succeed in using this vehicle.

Mr. HEYMANN. May I represent my friend, Buck Revell, on that question, Mr. Chairman.

Senator BAYH. I don't think he needs counsel, but you are certainly welcome to proceed.

Mr. HEYMANN. It is my eagerness to answer the question rather than his need. You know, even if it turned out that we only searched a lawyer's office five times, last year, which might be true. I don't have any idea. Let's say it turned out to be a very small number. If you were to create a bar to our searching a lawyer's office without some kind of showing that the criminals believed we would be unlikely to be able to make readily, we would soon find that documents were flowing into lawyers' offices.

We do have cases, and I have seen them. I suspect Buck has seen the same, where there is the most intimate of relationships between a lawyer and an ongoing criminal enterprise where the lawyer's office is used as the place for meetings——

Senator BAYH. Probably a coconspirator or participant in the crime, thus subject to being treated like a criminal. Excuse me for interrupting you.

Mr. HEYMANN. Sometimes, I think if you make the office available enough, you would probably get to be a coconspirator. But I am sure they would try to draw the line in such a way that the lawyer would not be a suspect, not be a conspirator.

Senator BAYH. I think there are compelling reasons for this client privilege. At this hearing today is Dr. Roeske, representing the American Psychiatric Association. I don't know what her testimony is going

to be, but I recall in our earlier testimony, we had a psychiatrist from California, who talked about the damage of just rummaging around an office without being restricted to requesting certain, specific information. When you are after medicaid or medicare fraud, and you request certain specific things the doctor will usually give it.

But the unfortunate stigma that still exists in our society on mental illness can cause severe problems. Let's suppose you are representing Buck here and he was running for Governor or President, or perhaps he had been nominated by the President to be Director of the Federal Bureau of Investigation, and in the process of one of these warrants, it came to the attention of certain people that he some time ago sought psychiatric help for an illness and now was cured.

It is the disclosure of that kind of information that can be very damaging. I guess what we are trying to do is to see how we can keep that kind of information from being disclosed, and yet, let you get the crooked doctor who may be patching up criminals after the crime and is a part of the conspiracy.

Mr. HEYMANN. I understand what you are saying. I think a search of psychiatric files is an extremely dangerous and troublesome thing, Senator Bayh. I would suspect that there is no record of that. I don't just mean argumentatively; I suspect we have never done it.

Senator BAYH. I don't know whether the Bureau has, but the police officials in California have, I know, because of the testimony of this psychiatrist.

Mr. HEYMANN. In the *Stanford Daily* case itself is where it came up, in the very same case there was a search of psychiatric records.

I think it is very troublesome. It is hard to legislate around that single problem. I think psychiatric files are quite different than orthopedic files. I suspect that everybody agrees with me on that. It is not terrible if we found out during Buck's campaign that he had a broken leg or dental files; psychiatric files are different.

It is hard to legislate it in part because you don't want to cover all doctors, I don't think, or you get or give the protection to orthopedic records in order to protect psychiatric records.

At the same time, you do want to cover psychologists, social workers, anybody who has highly personal records. It is the single limited area that I think presents the most troublesome search of a nonpress third party. But it is not one that we have done.

We could do something by regulation, by the way, without much trouble. We could require the personal approval of the Attorney General, for instance, for any such search.

It would not be a bad idea. It would not, of course, cover State and local searches.

Senator BAYH. Senator Baucus, do you have questions?

Senator BAUCUS. Thank you Mr. Chairman.

I am curious as to how often the FBI or any Federal law enforcement official is turned down when seeking a search warrant?

Mr. REVELL. That is not an unusual occurrence at all, sir. In the first place, there are many areas to be turned down.

Senator BAUCUS. I mean in the courts.

Mr. REVELL. In the courts, before the magistrates, I would say I couldn't give you a percentage, but I would say a significant incidence,

not the majority, certainly, because they have gone through such a stringent review process, both within the agency and before the U.S. attorney's office, but there are significant instances when a magistrate will deny a search warrant.

Mr. HEYMANN. I would have thought it was very, very few. We can check and see.

Mr. REVELL. I am talking about perhaps 3 or 4 or 5 percent, but sufficient to show that there is an independent review and the elements of probable cause must be there in accordance with the magistrate's determination, not just the U.S. attorney.

Senator BAUCUS. The second question I have is, how often do the reasons that Federal law enforcement officers give to a magistrate to obtain a search warrant parallel the exceptions of title III of S. 1790?

Mr. REVELL. Well, of course, the exceptions—we don't call someone a——

Senator BAUCUS. That is, how often is it because the person who has the material is about to commit or is going to commit a criminal offense, or there is reason to believe that the materials are necessary to prevent the death or serious bodily injury or there is reason to believe that the destruction, alteration or concealment of the materials is likely to occur?

I am wondering just how often the reason that law enforcement officers give to a magistrate are covered within these exceptions?

Mr. REVELL. Well, in essence, they are really different purposes. The purpose of a search warrant is one, to describe that which is to be seized, and second, to show that there is probable cause that it exists in a particular location, and third that it is connected with the crime.

These exceptions would not necessarily concern themselves with the elements that we are required to show to obtain a warrant.

Senator BAUCUS. Could you describe for me, because I have not been involved in Federal law enforcement activity, how do you show that materials you are looking for are connected with a crime? How extensive are your reasons or factors evidencing probable cause?

Mr. REVELL. Let me give you an example. We have an individual flying between Las Vegas and Chicago. We have an informant who tells us that this individual makes two trips a week, the times that he travels, that he is a courier between A and B, that he is carrying skim money from Vegas casinos and he is carrying records of who the payoffs are to go to, that this individual receives a locked briefcase, and does not know what is in that briefcase other than he is to go from A to B, and to give the briefcase.

That is a factual situation. It has occurred. We have used a search warrant in that type situation. The person carrying the evidence knows nothing of the contents or the individuals that he is delivering it to or involved in it. They are in fact picked, in many instances, because they do not know of the situation.

The search warrant points out what we expect to find in the briefcase, why we believe it is there, what probable cause we have to show that it is there, and of course, that is judicially approved. We obtain the warrant. We seize the evidence and it is what we stated it was.

Senator BAUCUS. Could you explain to me how you made the connection between the briefcase and a crime, particularly in the case of a person as you have described?

Mr. REVELL. Because the crime is the criminal enterprise. The criminal enterprise involves the skimming of money, the payoffs, bribes, and so forth, as would be described under Federal law.

The records and the money are part and parcel of that criminal enterprise. They are being couriered by an innocent third party, but they are cogent evidence of an existing and ongoing criminal enterprise and should be subject to seizure by the Government to prove this enterprise. And, in essence, they are today, under titles II and III, I have serious questions that we could obtain that evidence.

Certainly if we deliver a subpena, we could not take the individual into custody and take him before the grand jury. We would have no other process available. If no grand jury was sitting, sir, we wouldn't even have the availability of a subpena.

Senator BAUCUS. So you are saying in that in your hypothetical, one of the exceptions under title III of the bill, would apply?

Mr. REVELL. Yes, sir. It is my understanding, I assume the professor would agree with me.

Senator BAUCUS. I have no further questions.

Senator MATHIAS. Thank you Mr. Chairman. I have a brief statement. I ask unanimous consent that it appear in an appropriate place in the record.

Senator BAUCUS. [acting chairman, presiding]. I guess I am the chairman. Very well. Without objection, so ordered.

Senator MATHIAS. You are the chairman.

Now, referring to S. 1790, I am wondering if you could tell us exactly how title I would work in practice. Perhaps you could give a hypothetical case as to what would happen when you actually stand before the judge and try to put S. 1790 into effect?

Mr. HEYMANN. I would be happy to try, Senator Mathias. I haven't run through this operation in a few months. So, if I falter a little, please excuse me.

I take it that we would do exactly the same thing that Mr. Revell was describing to Senator Baucus. We would produce an affidavit in connection with a search warrant, and indeed, we would probably have a new form produced.

The affidavit would note for the magistrate or judge that what was being sought was either, if it was, work product or documentry evidence of the sort that is covered by the definitions provision of the bill. It may even be that a form would have that, those descriptions at the bottom of it, and you would have to check yes or no, and the magistrate would not accept the affidavit unless somebody had checked either no, this is not protected material under title I, or yes, and answered some additional questions.

If it is documentary material as defined in the bill or if it is work product, we would then have to state in the affidavit, not only what I took Senator Baucus was asking, we have to state now in the affidavit that for example, the dollars are themselves evidence of an illegal skim or they are the contraband that was taken, the fruits of an illegal skim. That would be enough nowdays to get those dollars.

We would have to, if it were documents or work product of somebody holding them for future publication, with a plan of future publication, we would have to numerate and give evidence of the particular exception that we were invoking. That would just be put in the affidavit.

The magistrate would either find that that was met or not. If the magistrate found that it was met, he or she would issue a warrant.

If we didn't do that, if we made a mistake or even if the magistrate made a mistake, the Federal Government would be subject to civil suit with, in a rather nice encouragement of the private individual to bring a private suit, liquidated damages, attorneys' fees.

Senator MATHIAS. Let me restate in *Stanford Daily* fact terms and see if we are completely on the same wavelength.

Are you saying that if the material sought in the *Stanford Daily* case had been reporters' notes, a work product and——

Mr. HEYMANN. It was the equivalent, it was photographs. When we write a first amendment bill, we really write one, Senator Mathias. It is notes, photographs, tape recordings, negatives. In *Stanford Daily*, the photographs were taken, as I understand they were, by the Stanford Daily publication as part of their news-gathering process would be work product.

Senator MATHIAS. So everything would have been precluded in the search of the daily.

Mr. HEYMANN. Even though the daily in fact said, and even though we knew they—even if we had known they had said they would destroy the negatives rather than turn them over as part of the subpena.

Senator MATHIAS. All right.

Mr. HEYMANN. That is a quite dramatic thing we are talking about there. They can say, "You subpena them. We won't deliver them." If it is work product, we say, "First amendment wins." It will be a while before you hear us saying that again.

Senator MATHIAS. So title I would have precluded the search of the daily because none of the exceptions to the work product searches would have been available?

Mr. HEYMANN. That's correct.

Senator BAYH [acting chairman, presiding]. If my colleague would yield just a moment.

Senator MATHIAS. Yes.

Senator BAYH. I have an emergency that has come up that I have to take care of. I hope to be back shortly, but if I am not, I assume my brethren will continue the committee action, and if not, I will ask Marcia to keep it going until I get back. I am sorry.

Senator MATHIAS. Well, title I, is really the Department's language, title I, of section 1790.

Mr. HEYMANN. And title VI, I believe.

Senator MATHIAS. It is your bill. Do you find yourself a little bit in the position of arguing around a circle? Aren't some of the arguments that are raised against all third party bills then applicable to first amendment activities protected under title I?

Mr. HEYMANN. Some of them are.

Senator MATHIAS. Aren't you arguing against your own case?

Mr. HEYMANN. Some of them are, but people exercising first amendment claims is a smaller group than all third parties. It is more than that. Of course, it is a smaller group and we can live with it more easily because it is a smaller group.

Of course, there is reason to distinguish the smaller group because they are raising first amendment claims and we care about first amendment claims.

But, there is more to it than that. When you say to us that you can't get the work product in the *Stanford Daily* case, as I said to you, we couldn't get that if they told us they were going to destroy those negatives, we couldn't get them.

It is a much smaller problem when you are dealing with anybody asserting a desire to publish, than it is when you are dealing with the sister of an organized crime leader.

In almost every case, that material will in due course appear as published material. Sometimes it won't, but often it will.

Those photographs that the local police wanted in the *Stanford Daily* case will be published in most cases. The notes that the reporter takes that we want——

Senator MATHIAS. That's a broad assumption. The number of pictures they take in this room and the number that appear in the paper are a very, very large discrepancy.

Mr. HEYMANN. You are correct. Absolutely. There is another difference. Institutions are different from private people. When I went through with the committee and I said, "Look. It is always going to be a wife, a husband, a father, a son, a spouse, a lover, a cousin, a longtime business associate, always someone that is likely to destroy it. There is one group that isn't so likely to destroy and that group is institutions. Institutions just don't have the same incentive to destroy. A bank doesn't have the same incentive to destroy.

Most people invoking the press protection, whether they are institutions or individuals, don't have the same incentive to destroy.

Senator BAUCUS. Including Presidents. [Laughter.]

Senator MATHIAS. Now Mr. Chairman, let's not bring partisanship into the hearing. [Laughter.]

Mr. HEYMANN. Occasionally, an institution may have reason to destroy. But there are real differences. I agree with you. To some extent the same objections we made to title II and III, can on a far smaller scale, be made to title I, even if it were true that it was simply a reduction of scale, but I would say, there is the first amendment to justify title I, and its scope is smaller, but there are other differences.

Generally these materials are published, often they are published and the possessors are institutions.

Senator MATHIAS. Well, Mr. Parker, in writing to Senator Bayh said:

> We acknowledge that some of the concerns we have noted about the difficulties of identifying suspects and assessing the probability of destruction of evidence and the unavoidability of some good faith mistake which will nonetheless result in strict governmental liability for damages are problems that may also arise in applying the search limitations proposed in the administration's bill. However, we anticipate that these problems will be significantly less severe in the context of a narrower bill such as S. 855, and the need to assure an independent and aggressive free press outweighs these law enforcement considerations.

But that I think then raises a question about what is our concern for privacy.

Mr. HEYMANN. For privacy?

Senator MATHIAS. Yes. The psychiatric search about which you yourself expressed concern. The lawyer's office in which 100 clients' files are exposed while searching for one thing.

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There is a privacy consideration which is very real, which stands next to your first amendment situation.

Mr. HEYMANN. The privacy——

Senator MATHIAS. There is a privacy question.

Mr. HEYMANN. There is a privacy concern. I suppose there are only two answers, Senator Mathias, and you may find they aren't totally satisfactory.

One answer is that in general, for every American, whether he happens to be lucky enough to be a lawyer or a doctor or not, and I would like to set the psychiatrists' files aside. They are unusual, they present an unusual problem, and one that the FBI and DEA and Federal law enforcement, as far as I know, have not confronted. I do not think we have gotten into that in any case.

But if you talk about ordinary citizens or people lucky enough to be doctors and lawyers, one answer is that the privacy versus law enforcement line was drawn in 1791, and it was drawn when they wrote the fourth amendment. They said if you have probable cause to believe that there is evidence there, at that time they would have talked about contraband or instrumentalities of a crime, but it amounted to almost the same as evidence, even well before this last decade, they said, if you have probable cause to believe there is evidence there, then the law enforcement interest overrides the privacy interests.

They said, if you are a step short of that, an inch short of that, if you suspect with all your heart that there is evidence there and you want desperately to get it, but you don't have probable cause, then the privacy interest wins.

Senator MATHIAS. But you just bridged over, with a sentence, 200 years in which the court was never asked about the search of non-suspects.

Mr. HEYMANN. I don't believe that is true, Senator Mathias. I suspect we would find, I suspect that we could find, I don't know that we have tried to do it——

Senator MATHIAS. If you could, I wish you would.

Mr. HEYMANN. I have assumed that it was taken for granted over those 200 years that the rule was that you could search wherever the seizable material was, wholly without any interest whatsoever in whether the place searched belonged to a suspect.

Senator MATHIAS. Well, if you think that has been decided, I think you have a duty to advise this committee of where and when it was decided.

Mr. HEYMANN. Let's see what we can come up with in terms of case support.

Senator MATHIAS. I put it in terms of a duty because I think it is a duty. When you were testifying, I expressed some eagerness to get to questions, because it seems to me inappropriate to put the search of a psychiatric file in the same category as seizing contraband with a warrant.

I don't think that issue was decided.

Mr. HEYMANN. If you try to look at privacy interests, Senator Mathias, you can't find a privacy interest more extreme, I suspect, than searching psychiatric files. Now it hasn't been done. But if you thought for a minute what would it be like if psychiatric files were

searched wholesale, you couldn't imagine a greater invasion of privacy, I suppose.

For that reason, I don't think we ought to treat it as the general rule, we ought to treat it as an extreme that has been recognized as extreme by the Federal Government, for all I know, by the States, although in *Stanford Daily* there was a search, and I think you will find there are others when your witness testifies this morning. I don't know the record, but I suspect we will find there were some others. But it shouldn't be the basis for titles II and III. We are way out there tens of thousands of miles past what will be the normal application of title II and title III. We are way out there in an area of——

Senator MATHIAS. But of course, our experience here in this committee is that the executive branch travels tens of thousands of miles very, very quickly.

Mr. HEYMANN. It doesn't feel that way on the inside, Senator Mathias.

Senator MATHIAS. Well, let me give you an example. I will give you one that you and I can be objective about because it does not involve the Justice Department directly. But in an effort to monitor illegal international banking transactions, we gave the Treasury the opportunity to look at some of the checks that passed.

The contemplation was that we were only dealing with a handful of large international transactions that might affect a dozen banks that were heavily into international business. We were looking at the probability of illegal—criminal funds or funds derived from criminal activity being moved from the United States to numbered bank accounts somewhere in Europe. What happens? The executive branch travels tens of thousands of miles, and we find that every citizen's banking account becomes subject to surveillance.

So, you provide, you can provide for the extreme case, and then suddenly you find that in a very short time that becomes the norm. You know, that is the kind of reaction that we have to contemplate here.

Mr. HEYMANN. It does make a lot of—the subject you brought up with me just before that relates very closely to it, Senator Mathias.

If indeed, I am right that third party searches of nonsuspects has been understood by the courts and the law enforcement agencies and the prosecutors to be perfectly permissible over hundreds of years, then there would be very little reason to start worrying suddenly about the impact of a decision that took place 2 years ago.

As a matter of fact, we know that there has been no impact. Nobody has complained about anything that the Federal Government has done since *Stanford Daily*. We never searched the press before *Stanford Daily*. I don't know, but I suspect we never search a psychiatrist.

If you are right, that suddenly a new power was granted to search third party nonsuspects in 1978, when *Stanford Daily* was decided, then there may be more of a reason to say we want to look carefully at where this power is going.

I think it was an ancient power. I think there was an argument for creating a new exception. It was rejected.

Senator MATHIAS. Well, you think it was an ancient power. I will tell you what I think. I don't think your predecessors thought they had that power.

I would say this further, that as long as Professor Heymann is there, steeped in the traditions of American constitutional liberty——

Mr. HEYMANN. A little bit like a tea bag.

Senator MATHIAS. Imbued with ardor for civil liberty, then perhaps we can all feel secure, even if you have this power, even if you are right that this power exists. But, as President Hoover once said, "In obedience to the inexorable laws of nature, we all pass along." You won't be there always. Let's suppose some yaho is sitting in your chair and he not only agrees with you that the power exists, but he isn't like a tea bag just soaked with ardor for civil liberty. Then what?

You know, Thomas Jefferson said, "Trust not in men, but bind them down with chains of the Constitution."

Mr. HEYMANN. In almost every situation, Senator Mathias, I believe the right situation is simply that there has to be probable cause. If we were talking about searching my sister's house for evidence that there was reason to believe, probable cause to believe was evidence, and in her possession; evidence against me, I would think the right rule, as well as what I have argued, the historic rule, is simply that you have to have probable cause to believe that there is evidence or contraband or fruits or instrumentalities of a crime in the particular location.

Then, it is not such an uncivilized process. You walk up to the door. You have to get a judicial warrant. You walk up to the door. You say, "We have the right to seize Heymann and his pipe, because we think we have fingerprints on it or something." My sister turns it over or the officers go through, in what ought to be a decent and a sensible way, looking to see if it is there.

I think that is where the line ought to be drawn, as well as has been drawn. Probable cause to believe that something that can be seized, properly be seized is in the location.

Senator MATHIAS. Well, I think if you have any historical light to throw on this subject it will be extremely helpful to the committee.

Mr. HEYMANN. We certainly ought to be able to try and present that.

Mr. REVELL. Senator, I have executed probably dozens of search warrants in 15 years. I have provided the affidavits to obtain the search warrants and have personally executed them. I certainly have executed warrants on persons, locations belonging to persons and in the possession of the persons who were not suspected of crimes, but where we had evidence meeting the probable cause standard that there was contraband or evidence of crime there.

Certainly this was the standard before *Stanford Daily* and it continues to be the standard today, the only exception being that the Department, by regulation, has stated that we will not search the news media or the press, except by authority of the Attorney General.

So we certainly have had the ability under the law to search for evidence when we had probable cause to believe that it was there.

Mr. HEYMANN. Mr. Pauley points out that every time we go into a bank, Senator Mathias, to search a safe deposit box, if we think a crook has stashed his fruits of crime in a safe deposit box, we just present a search warrant to the people at the bank, and we just politely walk in. The bank officers, the owners of the bank are innocent third parties. We have a right to search in a particular location in the bank for what we believe to be evidence or fruits of contraband. We do that probably hundreds of times in the year.

Senator BAUCUS. Will the Senator yield on that point?

Senator MATHIAS. Yes.

Senator BAUCUS. Thank you. Aren't those usually, isn't this usually instances where you are trying to find contraband or evidence that is not documentary evidence?

Mr. HEYMANN. Yes.

Mr. REVELL. I disagree. No. Documentary evidence is very important to——

Senator BAUCUS. But usually in the case—you said you indicated several search warrants. I do not know how many you have executed, dozens you said, but apparently several of those were instances where you were looking for material and where the person in possession is innocent apparently of the nature of material you are looking for.

But I take it that in those cases you are looking for if it is in safe debosit boxes, something that is in the nature of contraband or something that is much more closely related to a crime.

Mr. REVELL. No, sir. In many instances we are looking for documentary evidence which would be ledgers, books, records, journals, statements of payments, obligating notes, diaries, these are exactly the type of documentary evidence that we are looking for when we obtain the search warrant for a safety deposit box, in many instances, in organized criminal cases.

So, we could not make that statement with any assurance that was true; in fact, I know that it is not.

We do look for documentary evidence when we present a search warrant to a bank in many, many instances to go into a safety deposit box. That is the obvious locale for storage that is least accessible as far as outside intrusion.

So, we certainly do look for documentary evidence.

Senator BAUCUS. I have no further questions along these lines.

Senator MATHIAS. You are telling us that you have been issuing these warrants or you have been seeking these warrants and they have been issued on traditional fourth amendment grounds. Those traditional fourth amendment grounds have pitted law enforcement interests against those of criminal suspects.

The state of the record of this committee at this moment is that prior to *Zurcher* the court never really decided the question of whether the traditional fourth amendment test governing the issuance of search warrants, that is, whether sufficient cause existed to believe the material was in a given location was equally applicable in nonsuspect cases.

Mr. HEYMANN. I take it that they decided that directly in *Stanford Daily*. My argument that it has probably been decided a number of——

Senator MATHIAS. But without considering the privacy interests.

Mr. HEYMANN. They have to recognize the privacy interest because it is a fourth amendment argument. They have to be addressing that question, I think, Senator Mathias.

Senator MATHIAS. But wasn't that case really based on the traditional test, as I said? They really decided it by pitting the law enforcement interest against the criminal suspect, under the traditional fourth amendment test, without a real exposition of the privacy concerns?

Mr. HEYMANN. That is because they agreed with me that nobody has ever considered the possibility that the basis for search had something to do with the criminal conduct of the person searched.

They just assume with me, and I think we are likely to find it in many cases where they simply assume it, that search has nothing to do with criminal conduct of the person searched. It has to do with whether there is something there that the Government is entitled to seize.

Senator MATHIAS. Well, let's agree to disagree for the moment.

Mr. HEYMANN. OK.

Senator MATHIAS. And look at the record.

Mr. HEYMANN. All right. Sounds fair to me.

Senator MATHIAS. Thank you.

[The prepared statement and responses to additional questions by Mr. Heymann follow:]

PREPARED STATEMENT OF PHILIP B. HEYMANN

Members of the Committee, I would like to thank you for this opportunity to testify on S. 1790, which was introduced by Senator Bayh in September of 1979, and related legislation concerning limitations on searches and seizures by law enforcement officers. Titles I and IV of S. 1790 which were reported out of the Subcommittee chaired by Senator Bayh are essentially the same as the provisions of S. 855, the bill drafted by the Justice Department for the Administration and also introduced by Senator Bayh.

My purpose in appearing before the Committee today is twofold. First, inasmuch as I was intimately involved in the formulation of the Administartion's bill. I would like to address the provisions of Titles I and IV of S. 1790 and respond to any questions the members of the Committee may have on these proposed restrictions on searches for materials held by persons involved in First Amendment activities. The second, and equally important aspect of my testimony, is to express to the members of the Committee the Department of Justice's firm opposition to an extension of the sort of restrictions on otherwise constitutional searches proposed in the Administration's bill and Title I of S. 1790 beyond the area in which First Amendment interests are implicated, and the sound reasons for that opposition. Such prohibitions on third party searches appear in Titles II and III of S. 1790 as introduced by Senator Bayh, in S. 115, introduced by Senator Mathias, and S. 1816 introduced by Senator Nelson.

I. THE ADMINISTRATION'S PROPOSAL—S. 855 AND TITLES I AND IV OF S. 1790

As I noted above, Titles I and IV of S. 1790 essentially embody the provisions of the Administration's bill, S. 855, and it was these portions of S. 1790 which were reported out, with minor amendments, by the Subcommittee on the Constitution.

I was intimately involved in the development of the Administration's bill and have continued to monitor closely the progress of this and related bills in the Congress. In June of 1978, President Carter directed the Justice Department to conduct an exhaustive study of the issues which were raised by the Supreme Court's decision in *Zurcher* v. *Stanford Daily* (436 U.S. 547 (1978)) and to assess the possibility of generating a legislative solution to the problems which arose out of the Court's decision. Although the Court acknowledged that the requirements of the Fourth Amendment must be applied with "particular exactitude" when First Amendment interests might be endangered, it held that a search of a newsroom was not per se violative of the First or Fourth Amendments. In addition, the Court rejected the District Court's novel holding which was affirmed by te Ninth Circuit that the Fourth Amendment prohibited the issuance of a search warrant for evidence of a crime simply because the owner or possessor of the place to be searched was not implicated in the crime under investigation.

The concern of the President, which was shared by many in the Congress and the nation as a whole, was that third party searches of the press could have the effect of hampering the ability of those involved in First Amendment activities to gather and disseminate information. The risk that the threat of governmental searches might lessen the willingness of these persons to investigate sensitive or controversial issues and limit their ability to obtain information from confidential

sources is one that I believe we can ill afford to take. Furthermore, it is a risk that can be obviated without any significant reduction in our ability to investigate and prosecute crime.

In response to the President's directive, then Attorney General Bell formed a task force whose function it was to examine the issues raised by the *Stanford Daily* decision, and to draw up a comprehensive set of options to address these issues. It was from this option paper that the Department's recommendations were drawn and transmitted to the President. In December of 1978, the President announced the Administration position incorporating those recommendations. At that time I appeared before the Subcommittee on the Constitution to present the major outlines of the Administration's position. This position is embodied in S. 855 and Titles I and IV of S. 1790.

At the outset, I would note that the language of the prohibitions on searches which we drafted is general and inevitably imprecise, thus reflecting our intention that these restrictions on the search authority of federal, state, and local law enforcement officers where First Amendment interests are implicated are to have a broad sweep. In the long run, in light of the importance of the First Amendment values which would be protected by this legislation, we felt it was better to assure adequate protection through the use of broad provisions than to opt for narrow and restrictive language. Engrafting similar provisions onto an all third parties bill, however, will create significant law enforcement problems.

There are, I believe, three major features of the Administration's proposal. First, its protections extend to all persons holding materials obtained or prepared in connection with First Amendment activities rather than to the institutional press alone. Second, the proposed limitations apply where the materials being sought are documentary materials. By focusing on this class of materials, which would in any event be the likely object of a search that might implicate First Amendment values, a narrower and more stringent set of exceptions to the general prohibitions on searches may be applied. Third, our proposal distinguishes "work product" documentary materials—those which are created for the very purpose of disseminating information to the public—from other documentary materials, affording a higher degree of protection against search to the category of materials which fall within the definition of "work product".

The materials which are protected from search and seizure by the provisions of Title I of S. 1790 are described as those which are "possessed by a person in connection with a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication". Thus the protections afforded by this portion of the bill extend not only to the institutional press, but to academicians, authors, filmmakers, and free lance writers and photographers. While we had considered the option of a press-only bill, this format was rejected partially because of the extreme difficulties of arriving at a workable definition of the press, but more importantly because the First Amendment pursuits of others who are not members of the press establishment are equally as important and equally as susceptible to the chilling effects of governmental searches as are those of members of the news media.

Documentary materials, which encompass all materials "upon which information is recorded", were selected for protection for three reasons. First, it is searches for these sorts of materials that pose the most significant danger to First Amendment values. Such searches would often necessitate examination of numerous irrelevant papers and files in order to locate those which pertain to the investigation in question. The import or nature of documentary materials, unlike non-documentary items such as weapons or narcotics, is often not apparent at first glance, but instead requires an examination of the contents of such materials. Thus, while the scope of searches for non-documentary materials may be effectively limited so as to exclude scrutiny of extraneous items on the premises, searches for documentary materials are rarely susceptible to such limitations, and as a result are likely to entail rummaging through files containing sensitive and confidential information which bears no relation to the criminal activity being investigated.

A second reason for restricting the application of this bill to searches for documentary materials is the fact that the purpose of such searches is generally to gain access to the information contained therein. To the extent that this information is generated through the investigative efforts of a reporter or researcher, as will often be the case where the materials constitute "work product", it may frequently be duplicated by a similar effort on the part of law enforcement

officers. On the other hand, searches for non-documentary materials, such as contraband or property of a defendant which may bear incriminating fingerprints or other physical evidence, arise out of a need to obtain unique items which cannot be duplicated through further investigative effort.

Third, the bill's focus on documentary materials enabled us to narrow the exceptions employed in the bill and thereby provide significantly greater protection against searches for materials critical to First Amendment activities of gathering and disseminating information to the public.

I would like to stress that the decision to extend protections against searches to documents which are held for First Amendment purposes in no way reflects an assessment that documentary evidence is of lesser importance than other forms of evidence which may be subject to search and seizure. Indeed, introduction of documentary evidence is crucial to securing conviction in significant numbers of federal prosecutions, particular in the priority areas of white collar and organized crime.

Despite the importance of securing documentary evidence, we believe that where documents are held for the purpose of disseminating information to the public by persons not implicated in the crime under investigation, such documents should be sought, except in extremely limited circumstances, by subpoena rather than by search and seizure.

Under the Administration's bill, documents which are held for purposes other than the dissemination of a form of public communication are not protected from search. These documents might include business records or documents which indicate the ownership of property. For example, notes made by a corporate officer which were made in preparation of a confidential memo that is later made public in an exposé of a securities fraud would not be protected in the hands of the corporate officer for he never held them for the purpose of making their contents known to the public. Similarly, business records or reports required to be filed with the government, and which as a result are open to public examination, would not come within the scope of the Administration's proposed search restrictions because they were prepared for the purpose of meeting the reporting requirements, not for the purpose of communicating with the public.

The degree of protection afforded documentary materials which are covered under the Administration's proposal turns on whether the materials constitute "work product" or not. A search for "work product" documentary materials may be conducted only in two instances: (1) Where there is probable cause to believe that the possessor of the materials has committed the crime under investigation, or (2) where there is reason to believe that the immediate seizure of the materials is necessary to prevent death or serious bodily injury. A search for non-work product documentary materials may be conducted under the same two circumstances and in addition where there is reason to believe that the materials would be destroyed, concealed, or altered if sought by subpoena, or where the possessor of the materials has refused to obey a court order directing compliance with a subpoena duces tecum. Non-compliance with a subpoena, however, is a basis for permitting a search only if either all appellate remedies have been exhausted or the government is able to demonstrate that further delay in permitting exhaustion of appellate remedies would "threaten the interests of justice." In essence, then, work product materials are afforded the protection of a general no-search rule, while non-work product materials are subject to a subpoena-first rule.

The term "work product" encompasses those materials whose very creation arises out of a desire to communicate to the public. What triggers the work-product no-search rule is the fact that the materials which are sought were created by or for a person in connection with his plans or the plans of the person creating the materials, to communicate information to the public. Thus the notes and drafts of a reporter would be work product, as would be the photographs which were the object of the search in the *Stanford Daily* case. Furthermore, a report revealing government corruption prepared by a "whistleblower" and sent to a newspaper for publication would constitute work product as well.

As I noted above, searches for materials which fall within the definition of "work product" are prohibited under Title I of S. 1790 with only two limited exceptions. The first of these two exceptions, which has been referred to as the "suspect exception", allows a search for work product materials if there is probable cause to believe that the person possessing the materials has committed the crime for which the materials are being sought. While this provision is cast

in the form of an exception, it really codifies a core principle of this legislation which is to protect from search only those persons involved in First Amendment activites who are themselves not implicated in the crime under investigation. This "exception" is non-controversial. To my knowledge, none of the critics of the *Stanford Daily* decision have suggested that a search which is otherwise permissible under the Fourth Amendment is not appropriate where the possessor of the materials is himself a suspect in the crime being investigated.

The suspect exception has been carefully formulated so that it does not provide a means of circumventing the no-search rule. It is a very stringent standard. The standard of proof which must be met by officers seeking a search warrant under this exception is the same as that which would be required to obtain a warrant for the arrest of the person possessing the materials. Frankly, the suspect exception is so narrowly framed and thus so difficult to meet, that I doubt that it could be utilized except in very rare circumstances where the possessor's culpability is quite clear. Early in an investigation, the stage in which search warrants are generally sought, the identity of suspects may not be established at all, or may not be established with sufficient certainty to meet the probable cause standard articulated in this provision.

One aspect of the suspect exception has generated some confusion, and that is its limitation where the crime the possessor of the materials is suspected of committing consists of the possession, receipt, communication or withholding of the materials being sought. I was concerned that where a reporter, for example, had knowingly received a stolen corporate report, the suspect exception could be invoked because the reporter might be said to be guilty of a crime of receipt of stolen property. To permit a search in such circumstances, I believed, might unduly broaden the suspect exception. In considering which offenses might be appropriately exempted from the suspect exception, the concern arose that a number of our espionage statutes are phrased in terms of the possession, receipt, or communication of highly sensitive national security information. Because of the gravity of these offenses, we believed that the legal authority to search should be retained where the possessor of the materials was believed to have committed the offense in question. By relying on citation to present laws in this area rather than attempting to devise a new formulation to address this issue, we sought to avoid burdening our search protection proposal with complex and difficult espionage issues. It is important to remember that the cited offenses involve exclusively federal matters and that there is no past history of federal searches of the media based on these statutes or any other federal laws.

To my knowledge, none of the other bills which have been introduced would acknowledge any instances in which a search for materials held by a suspect would not be permitted. Indeed, none of the critics of the *Stanford Daily* decision has suggested such a measure. Nonetheless, our proviso to the suspect exception which gives a greater degree of protection than any other bill by recognizing a limited class of lesser secondary offenses as to which even the suspect exception may not be applied, has come under criticism, I believe, simply because of its reference to certain espionage offenses.

The concerns about our proviso which have been voiced by certain members of the press emanate from a misunderstanding of our intentions in formulating this limitation on the suspect exception. First, our citation to these few espionage offenses in no way marks a change in our prosecutive policy concerning these offenses, either in regard to the members of the press or the public generally. Second, our reference to these offenses should not be misinterpreted to indicate that seizure of materials because of their evidentiary value in a criminal investigation may be used as a means of preventing publication. The only means of preventing publication is through an injunction where the government is able to meet the stringent requirements articulated by the Supreme Court in *New York Times Co.* v. *United States*, 403 U.S. 713 (1971). Let me state categorically that it is the Department's unwavering position that a search and seizure is not a permissible means of circumventing the doctrine of prior restraint. This is not a matter of policy. It is a matter of law.

Certainly, if the concerns of the critics of our proviso go to the language of the statutes which are cited, consideration of any amendment of the espionage laws is of such importance that it should be the focus of separate consideration by Congress, and should not be treated as an ancillary matter in the context of the bills which are presently before the Committee which concern search and seizure generally. Indeed, I believe that had we not attempted to delineate a limited class

of offenses as to which the suspect exception might not apply, the issue of the espionage laws in the context of this legislation would never have arisen.

The second circumstance in which a search for work product materials is permitted is that in which there is "reason to believe" that the immediate seizure of the materials is necessary to prevent death or serious injury. In these instances, the preservation of human life must be our paramount concern. These are exigent circumstances which do not allow extensive investigation prior to the seizure of materials that are reasonably believed to contain information that may indicate the location of hostages or kidnap victims or the identity of a criminal who is in a position to imminently maim or kill his victim. Therefore, the "reason to believe" standard which is higher than mere suspicion, but which is intended to be considerably less demanding than "probable cause", should be employed when this life-in-danger exception is to be invoked.

Unless one of these two exceptions applies, law enforcement officers may not conduct a search for work product materials which are being held in connection with the dissemination of a form of public communication. Instead, these materials must be sought through the use of a subpoena duces tecum or an informal request. In the face of a refusal to comply with a subpoena, the sanction of contempt may be imposed by the court. But even if the penalties of civil or criminal contempt do not result in the production of the materials, a search for these work product materials is nonetheless prohibited.

Searches for non-work product documentary materials under section 2(b) of S. 1790 may be conducted in a broader range of circumstances than may searches for work product materials. Under section 2(b) are listed four circumstances under which a search for non-work product materials is permissible. The first two are identical to the suspect and life-in-danger exceptions which apply to work product and which have been discussed above.

In addition to these two exceptions, a search may be permitted if it is demonstrated that there is reason to believe that the giving of notice pursuant to a subpoena duces tecum would result in the destruction, alteration, or concealment of the materials being sought. It is our view that where non-work product materials are involved, the need to obtain and preserve evidence necessary to the successful investigation and prosecution of crime outweighs the need to avoid the disruptive effects of a governmental search where there is a demonstrated likelihood of destruction or concealment. Demonstrating the likelihood of destruction or concealment will not be an easy task for law enforcement officers. The circumstances in which this exception might apply would be quite limited. For example, the exception might come into play where a reporter had under similar circumstances in the past concealed evidence sought by law enforcement officers had announced that he would destroy the materials rather than turn them over to the police. Similarly, a showing that a suspect had access to the premises where the evidence was located or that the suspect was able to intimidate or otherwise clearly control the actions of the possessor of the materials might constitute grounds for obtaining a warrant under this exception.

The fourth and final exception provided by section 2(b) of S. 1790 under which a search for non-work product materials may be conducted is that where the possessor of the materials refuses to obey a court's order directing compliance with a subpoena duces tecum. A search does not become permissible immediately upon such non-compliance. Either the possessor of the materials must be given an opportunity to exhaust his appellate remedies or the government must demonstrate that the delay in the investigation or trial which would be caused by further proceedings concerning the subpoena would threaten the interests of justice. In the event a search warrant is sought prior to the exhaustion of all appellate remedies, the possessor of the materials must be given an adequate opportunity to submit an affidavit setting out the basis for any contention that the materials sought are not subject to seizure. Such contentions might include an assertion that there is not a sufficient basis to meet the probable cause requirements of the Fourth Amendment, or that the materials are in fact work product and thus not subject to seizure.

While permitting the government to demonstrate that further delays may threaten the interests of justice is not intended as a means of circumventing the subpoena-first rule, it must be recognized that exhaustion of appellate remedies in some jurisdictions may require months if not years.

While such delays may be tolerable in some cases, they may be devastating in others. What this provision does is place a burden on the government to demonstrate why, after the subject of the subpoena has been unsuccessful in his initial opportunity to challenge the subpoena, the government should be permitted to

move to seize the materials. The most clear cut examples in which a search warrant might be obtained under this final exception prior to the exhaustion of appellate remedies would be difficulties in meeting the time constraints imposed by statues of limitations or the Speedy Trial Act. Other examples might be situations in which the success of an investigation or prosecution is likely to be jeopardized by the interruption occasioned by a lengthy appeal. Often the effectiveness of the criminal justice system hinges on swift action in bringing a case to trial. Awaiting resolution of an appeal that may take months or even years may be intolerable from a law enforcement standpoint, for example, in cases involving highly mobile drug trafficking or in the case of ongoing crimes which endanger the health and safety of the public or where the ability to obtain a conviction through eyewitness identification diminishes rapidly with time.

The provisions of Title I of S. 1790 are to be enforced through a civil cause of action for damages. Persons who are aggrieved by a search in violation of the provisons of the bill would be able to recover actual damages, but in no event less than one thousand dollars in liquidated damages. A provision for liquidated damages is essential for it may be difficult for a plaintiff to establish any significant amount of actual damages.

If the violation complained of has been committed by a federal or local officer, the governmental unit employing the officer will be exclusively liable for the violation. However, because of the question of the Eleventh Amendment's limitations on the imposition of liability on the states for the payment of money damages, officers employed directly by a state will remain personally liable until such time as the state may pass legislation substituting itself as the sole plaintiff in cases that might be brought under this proposed legislation.

An important feature of the proposed civil damages scheme of S. 1790 and S. 855 is that when a government is liable for a violation it is precluded from asserting as a defense the good faith of the officer or his immunity from suit. A bar on the use of these defenses by governmental units will significantly increase the likelihood that a plaintiff will be successful in his suit. There is however, no such restriction on the defenses that may be raised by individual officers who may be held personally liable.

It should be noted that while the United States will be exclusively liable for any money damages assessed as a result of violations of these restrictions by its officers, those officers who willfully disregard these provisions will be held responsible for their acts. The remedies provisions require that an administrative inquiry be commenced if a federal officer is found to have committed a violation of these proposed limitations on search and seizure and calls for the imposition of disciplinary measures where appropriate.

We do not believe that it is either appropriate or necessary that the sanction of the "exclusionary rule" apply to evidence which is obtained in violation of the provisions of these proposed restrictions on otherwise constitutionally permissible searches. As I indicated above, the Administration's bill was designed so that the very generous damage remedies provided for even a good faith breach of the legislation's provisions would constitute the sole remedy available for a violation; the exclusionary rule would not apply. However, the legislation before the committee is less than clear on this subject.

Because of the importance of the issue of the application of the exclusionary rule, we urge that the Committee either provide that the bill or its legislative history plainly state the inapplicability of a rule of exclusion. Since, by definition, the proposed restrictions on search and seizure have been determined by the Supreme Court not to be mandated by the Fourth Amendment, no problem of seeking to overturn an arguably constitutionally rooted exclusionary rule arises. The question of whether the exclusionary rule attaches to noncompliance with a statute limiting searches and seizures where such limitations are not required by the Fourth Amendment is a matter of legislative intent.[1] The Court has applied the exclusionary rule in a series of decisions involving violations of 18 U.S.C. 3109, which generally requires a knock and announcement of purpose and identity by federal officers before they may break open a door or window to effect an entry to execute a search warrant.[2] But these decisions are not dispositive for two reasons. First, the issue of the applicability of the exclusionary rule in these

[1] Compare *United States* v. *Caceres*, 440 U.S. 741 (1979).

[2] See *Sabath* v. *United States*, 391 U.S. 585 (1968); *Miller* v. *United States*, 357 U.S. 301 (1958); see also *Wong Sun* v. *United States*, 371 U.S. 471 (1963); *Ker* v. *United States*, 374 U.S. 23 (1963).

cases was not disputed or discussed but rather assumed; and second, that statute, unlike the proposed legislation before the Committee, is likely a codification of the requirements of the Fourth Amendment itself.[3]

Thus the choice whether to apply this much-criticized principle rests in this instance with the Congress. In our view, the exclusionary rule should not be applied to this proposed statute. The uniquely generous civil damages remedies afforded, coupled with provision for administrative disciplinary sanctions, provide an ample deterrent to violations. There is, therefore, no reason to penalize society through the costly additional sanction of excluding from a criminal trial reliable and probative evidence obtained as a result of violations which, in our judgment, will be in most cases inadvertent and unintentional.

In sum, I believe that the Administration's proposal, originally introduced as S. 855 and now set forth in Titles I and IV of S. 1790, strikes an appropriate balance between the interests of law enforcement and the need to protect First Amendment values. Its restrictions on third party searches of persons involved in First Amendment activities, while significantly circumscribing existing authority to conduct searches, will not unduly compromise our ability to investigate and prosecute crime. Unfortunately, the same cannot be said for the broad third party bills which have been introduced.

II. EXTENSION OF LIMITATIONS ON SEARCH AND SEIZURE TO ALL THIRD PARTIES

We are aware that some bills have proposed extension of the kinds of limitations on searches in the context of protecting First Amendment values to *all* searches for documents or other evidence which might arguably be characterized as "third party" searches. We believe such an extension to be unwarranted and unwise. In considering the appropriate response to the *Stanford Daily* decision we thoroughly studied the possibility of some sort of restriction on searches of third parties generally, and in response to the introduction of all-third-party bills in Congress we have on more than one occasion devoted considerable time to reconsideration of the ramifications of such a measure. After an assessment of the probable effects of such a measure and consultation with the United States Attorneys and federal law enforcement agencies, it became clear to us that the enactment of sweeping restrictions on third party searches would have a serious effect on federal law enforcement efforts. Furthermore, there is absolutely no justification for the imposition of such debilitating restrictions on lawful searches on federal law enforcement, for there has been no demonstrated pattern of abuse of third party search powers by federal law enforcement agencies.

I would like to stress that the Department of Justice has no argument with the policy considerations which I believe underlie these broad third party proposals. Where there exists an effective alternative to search and seizure as a means of obtaining evidence from innocent third parties such alternatives, whether in the form of a subpoena or an informal request, should be used. Indeed, the absence of evidence of abusive third party searches by federal law enforcement officers either prior to the *Stanford Daily* decision or since that time demonstrates that this is in fact a policy by which the Department of Justice abides.

Even though, in our view, these broad third party proposals address a nonproblem at least as far as federal law enforcement is concerned, we would not object to such proposed restrictions if the impact of the proposals were benign or even neutral. However, that is not, unfortunately, the case. Not only do we firmly believe that such measures are unduly burdensome from a law enforcement perspective, we also anticipate that they will be ultimately counterproductive from a privacy standpoint.

Inasmuch as the *Standford Daily* decision is asserted as the impetus for the broad third party search restrictions that have been proposed, I believe a brief review of the case is in order. The District Court opinion (353 F. Supp. 124 (N.D. Cal. 1972)) which was affirmed and adopted by the Ninth Circuit (550 F. 2d 464 (1977)) held first that the Fourth Amendment prohibited the issuance of a search warrant for materials in the possession of a person not suspected of a crime unless there is probable cause to believe that a subpena duces tecum would be impracticable. The District Court held in addition that where First Amendment interests are implicated, such a search is permissible only upon a clear showing that important materials would be destroyed or removed and a restraining order would be futile.

[3] See *United States* v. *Miller*, supra, 357 U.S. at 313.

In rejecting the District Court's opinion regarding third party searches generally, the Supreme Court correctly noted:

"It is an understatement to say that there is no direct authority in this or any other federal court for the District Court's sweeping revision of the Fourth Amendment. Under existing law, valid warrants may be issued to search *any* property, whether or not occupied by a third party, at which there is probable cause to believe that fruits, instrumentalities, or evidence of a crime will be found. 436 U.S. at 554 (footnote omitted)."

Indeed, the District Court's opinion does not cite one case on point as a precedent for its holding that a warrant may not issue for a third party search unless there is a showing that a subpeona is impracticable.[4] Even Justice Stevens, the sole Justice who would have affirmed the District Court's holding regarding third party searches generally (Justices Stewart and Marshall would have affirmed on the basis of a finding that the search in question was violative of the First Amendment), characterized the question of the propriety of third party searches as "novel".[5]

Thus it is patently incorrect to characterize the Supreme Court's holding that the Fourth Amendment does not forbid "issuing warrants to search for evidence simply because the owner or possessor of the place to be searched is not then reasonably suspected of criminal involvement" [6] as a reversal or departure from established Fourth Amendment law. It was, in fact, the District Court's proposition that was unprecedented and revolutionary.

The Supreme Court did acknowledge, however, citing *Stanford* v. *Texas*, 379 U.S. 476, 485 (1965), that "[w]here the materials sought to be seized may be protected by the First Amendment, the requirements of the Fouth Amendment must be applied with 'scrupulous exactitude'." [7] The Administration's proposal would assure that where First Amendment interests are so endangered, the "scrupulous exactitude" sanctioned by the Court would in fact be met.

It has been argued that even if the Supreme Court correctly stated that the Fourth Amendment did not require the use of subpoenas rather than searches to obtain materials held by third parties, in doing so the Court sanctioned the use of searches to obtain such materials and that the effect of the decision would be to encourage types of third party searches which law enforcement officers formerly had refrained from conducting. Fortunately, at this point we have the benefit of being able to review the two years which have passed since the Court's decision in *Stanford Daily* to determine whether such a reversal in law enforcement policy and practice has indeed occurred. Experience has demonstrated that these fears have not been borne out. We know of no pattern of abusive third party searches by federal law enforcement officers, and there have been only limited numbers of such cases involving state and local authorities, all of which, I believe, the courts have satisfactorily redressed.

That no such trend toward the unnecessary use of third party search warrants has developed is not surprising for there is simply no incentive for a prosecutor to proceed with a search when it is clear that proceeding by a subpoena is an equally effective means of obtaining evidence from a blameless third party. As the Court noted in *Stanford Daily*, when a prosecutor chooses to use a search warrant he has selected the "more difficult course." [8] While, as discussed below, subpoenas are not always available, where a subpoena may be obtained, there is no requirement of judicial involvement or proof of probable cause as a prerequisite to issuance. Even where enforcement of the subpoena is challenged. the grounds for non-compliance are extremely limited. In addition, it must be recognized that the execution of a search warrant requires the interjection of law enforcement officers into an unknown and often potentially dangerous situation. Where a subpoena exists as a clear alternative means of obtaining evidence of a crime it will be chosen so as to avoid subjecting law enforcement officers to a potentially dangerous encounter. Finally, prosecutors and law enforcement officers alike are painfully aware of the need to maintain good rela-

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[4] The court cited *Bacon* v. *United States*, 449 F.2d 933 (9th Cir. 1971) as a "factor supporting the requirement for the subpoena duces tecum alternative." 353 F. Supp. at 132. Inasmuch as *Bacon* addresses the issue of the arrest of a material witness, the court's analogy was strained and viewed by the Supreme Court as "unpersuasive." 436 U.S. at n. 5.

[5] 436 U.S. at 577.

[6] Id. at 560.

[7] Id. at 564.

[8] Id. at 563.

tions with their community, and when possible will thus seek to proceed by a less intrusive means where the privacy interests of third parties are at stake. In sum, there simply is no incentive for the use of search warrants to obtain evidence in the possession of uninvolved, disinterested third parties when the use of subpoena duces tecum would clearly suffice.

Thus there is no need for the kinds of sweeping restrictions on third party searches which have been proposed. The broad scope of these bills, coupled with narrow exceptions which may be invoked only when stringent standards of proof are met by sufficient factual showings, will in effect result in the destruction of crucial evidence in a significant number of cases. It is for this reason that the Department of Justice is firmly opposed to the enactment of such measures.

The format common to the third party bills which have been introduced is that the issuance of search warrants is to be prohibited save in those circumstances where law enforcement officers are able to make a showing (generally by a probable cause standard) either that the possesor of the materials or the occupant of the premises to be searched is believed to have committed the crime under investigation or that proceeding by subpoena will result in the destruction, concealment, or removal of the evidence. The assumption that underlies such provisions—that law enforcement officers will be armed with sufficient information concerning the commission of the crime and the relationship of the possessor of the materials to the crime and those who have committed it to secure a search warrant in those instances in which proceeding by subpoena would result in the compromise of the materials being sought—is simply fallacious and at odds with the realities of criminal investigations.

First, search warrants are most often employed at the early stages of an investigation when the identity of all, if any, of those who have committed the crime frequently will not have been established. Of course, if a search warrant is to be obtained, the applying officers must be able to demonstrate that there is probable cause to believe that a crime has been committed and that fruits, instrumentalities, or evidence of that crime are located on the premises to be searched. To require further that the applicants establish that the possessor of the materials is implicated in the crime under investigation as a prerequisite to obtaining the warrant will effectively preclude obtaining probative evidence in a number of cases. In essence this requirement would prohibit the use of a search warrant unless there is a sufficient evidentiary showing to support the simultaneous arrest of the possessor of the materials. Such a requirement ignores the fact that it will often be the very evidence which is sought which will establish the culpability of the possessor. Establishing the identity of suspects at the earliest stages of an investigation without resort to the seizure of evidence whose location and existence is known will be especially problematic in large scale criminal investigations where there may be multiple defendants or co-conspirators. The situation often arises in such cases that there are persons who have apparently participated in some way in the criminal activity under investigation, but whether they have done so knowingly or merely unwittingly facilitated the crime will not be clear at the outset. Being required to proceed by subpoena because the culpable status of such persons is not and perhaps cannot be established until a later point in the investigation, poses a significant risk that evidence essential to obtaining conviction will either be destroyed or placed beyond our reach.

For example, a New York investigation revealed evidence of widespread fraud involving VA and FHA mortgages. More than sixty convictions resulted from this investigation, and this was due in no small part to evidence which was seized during searches of mortgage companies and the offices of real estate brokers. The suspect status of all those persons whose offices were searched was not known at the time the warrant was obtained nor could it have been. What was known was that evidence probative of the commission of a crime was located on these premises, and that among those persons who occupied these offices were those who participated in the frauds. The documents which were seized were vital to the successful prosecution of these cases, for they not only traced the illegal transactions, but they also revealed the identity of those involved in the frauds under investigation. To have been restricted to proceeding only by subpoena in this case would have surely meant that this crucial evidence would have been removed or destroyed.

Indeed there are types of cases in which search warrants are routinely used because apparent "third parties" are ultimately shown to be suspects with some frequency. For example, in the case of warehouses, search warrants are routinely

used to seize stolen or smuggled goods and related documents such as receipts and bills of lading which show the movement of these goods and often reveal the identity of those involved in these transactions. A primary reason for using search warrants in these cases is the fact that the warehousemen are often involved in the crimes. However, it often would be difficult to establish the involvement of these warehousemen prior to the seizure of such evidence. Under the proposed third party search restrictions, our agents would be required to proceed by subpoena despite the fact that their experience tells them to do so would be unwise.

Even where it is clear that the person possessing the materials sought is not criminally involved, it is not safe to assume then that the processor will comply with a subpoena. Individuals do not as a rule come into possession of evidence of a crime inadvertently or unwittingly. They generally come into possession of such evidence either because they have been involved in the crime, or by virtue of some relationship to those who have committed the crime. This relationship may be one of family, friendship, or business or other association. As a result of this relationship, the third party may owe a loyalty to the suspect, or be under his control or influence. Furthermore, where such a relationship exists, it becomes increasingly likely that the suspects will have access to the premises where the evidence is located.

Thus it cannot be said that third parties who are in possession of evidence of a crime are likely to be disinterested parties. Indeed, the circumstances which lead to their possession of such materials in many cases are likely to be the very same circumstances which make it probable that they will not be fully responsive to a subpoena. It would be naive not to recognize that many legally innocent persons who possess evidence of crimes are likely to be subject to intense pressures, whether stemming from strong personal loyalties or fear of retribution, either to take it upon themselves to destroy or conceal evidence or to create an opportunity for the suspect to take such action himself.

The only discrete class of third parties for whom these considerations generally do not hold true are institutional record holders. Like members of the press, they do not come into possession of evidence of a crime out of a particularly sympathetic relationship with the suspects. They represent an identifiable class of disinterested third parties who presumptively can be expected to comply with a subpoena. Furthermore, searches through the files of institutional record holders potentially may impinge on the privacy interests of numerous uninvolved persons. Because of these consiedrations unique to institutional record holders, restrictions on obtaining materials held by them may be appropriate and have been and now are the subject of separate legislation (e.g. the Right to Financial Privacy Act enacted last Congress).

Thus in prohibiting searches of the premises of all third parties, i.e. persons as to whom there is not probable cause to believe they have committed the crime under investigation, there will often be a grave risk that proceeding by subpeona will result in the destruction, alteration, or concealment of evidence. While the broad third party proposals would permit a search warrant to issue if there were a sufficient factual showing that the third party would destroy or remove the evidence sought, it must be realized that in most cases it will be impossible to make such a showing. Indeed, I cannot conceive of many instances where the grounds for these proposed destruction exceptions could be met. Although an announcement by the possessor that he would defy the subpoena or clear evidence showing that known suspects had access to the premises occupied by the third party might suffice, the mere fact of a close sympathetic relationship probably would not. In the majority of cases in which officers accurately determine that proceeding by a subpoena would be impracticable, the evidence which supports their belief is circumstantial. This sort of evidence, coupled with the experience of the officer and prosecutor, has been shown to be an adequate basis for determining when third party searches are appropriate and when they are not. However, this is not an adequate basis for the kinds of factual determinations that would be required to be made by the courts under the broad third party bills which have been proposed. The impossible situation in which federal enforcement agencies would be placed by requiring this sort of factual showing was noted by the Supreme Court in the *Stanford Daily* decision in its discussion of the reasons for a prosecutor's choice to proceed with a search rather than a subpoena: "His choice is more likely to be based on the solid belief, arrived at through experience, but difficult to sustain in a

specific case, that the warranted search is necessary to avoid the destruction of evidence." [9]

The difficulties in making a factual showing in a specific case sufficient to invoke a destruction exception to a no-search rule are illustrated by the following hypothetical case. Let us assume a situation in which our agents have probable cause to believe that an organized crime figure has stored certain records with his sister. Included in these documents are records of his payments to hit men. The sister is not a suspect, and other than her relationship with her brother, we know of no other specific fact that could support an assertion before a judge that she would permit the removal or destruction of the evidence if it were sought by subpoena. Nonetheless, it seems clear that in this case, proceeding by subpoena would create a significant risk that the evidence would be removed or destroyed. However, the mere fact of a brother-sister relationship is hardly the sort of showing that a judge would find sufficient to overcome a statutorily prescribed prohibition on third party searches, a prohibition that in effect can only be overcome by a demonstration to the court that the possessor of the materials would participate in an obstruction of justice if notice were given by using a subpoena. Certainly in this case, it cannot be said that the protection of the sister's privacy outweighs society's interest in obtaining the conviction of a person involved in murder for hire.

In addition to the difficulties of establishing the suspect status of the possessor of the materials sought or the probability that proceeding by subpoena would result in the destruction or concealment of evidence, there are other considerations which render a broad prohibition on third party searches intolerable from a law enforcement standpoint. First, it must be recognized that the availability of the intended alternative to a search warrant, the subpoena, is limited. Subpoenas are available to federal law enforcement agencies only when the grand jury is conducting an investigation in contemplation of handing down an indictment or at the time of trial. Furthermore, the availability of grand jury subpoenas is limited in those less populous districts where the grand jury does not sit continuously. Second, the enactment of these broad restrictions on third party searches would in effect create vast sanctuaries for evidence. We would be foolish not to recognize that criminals are sufficiently sophisticated to turn constraints on the authority of law enforcement officers to their own advantage. By placing evidence such as the records of an illegal enterprise in the hands of a trusted "third party," criminals can be assured that they will have notice that these materials are being sought by the police and an opportunity to see that they are destroyed or removed. To deny the potential problem of the creation of sanctuaries for evidence is to ignore the sophistication and careful planning that marks the criminal activity which is the focus of major federal law enforcement efforts.

It is already the case that our agents frequently encounter situations in which neutral "dumping grounds" such as warehouses, or apartments leased in the name of fictitious persons or corporations or in the name of family members or friends are used as repositories for contraband or evidence of a crime. Under the broad bills which have been introduced, searches of these premises would constitute third party searches. In fact, I believe that only Senator Nelson's bill recognizes that there will be situations in which the possessor of the materials or the owner or occupant of the place to be searched is not readily ascertainable.

Such situations arise with considerable frequency. For example, in an area of New York known as the "cocaine capital," it is the practice of cocaine traffickers to move from apartment to apartment. Our agents simply do not know who the owner or lessor of these apartments may be. This is not problematic presently because search warrants are directed at places, not persons. However, if it were necessary in order to obtain a search warrant to establish that the occupant or owner of the premises was a suspect or likely to defy a subpoena, securing a warrant in these situations would become extremely difficult despite the fact that existence and location of probative evidence was known.

In addition to the significant burdens on our ability to obtain evidence which would inevitably result from the imposition of these proposed broad third party search prohibitions, it is important to point out that the very measures which are being contemplated to protect the privacy interests of third parties will in fact set the stage for further intrusions, heretofore unnecessary, into the privacy of innocent parties. Any legislation which creates general third party search restric-

[9] Id. at 563.

tions, but with exceptions based on likelihood that the possessor will destroy or conceal the materials, will shift the focus of the warrant procedure to require an examination of the possessor of the materials being sought, and will require an extensive examination of his or her relationship to the crime and to known suspects. Thus, this sort of proposed legislation will likely generate undesirable but necessary investigations by federal law enforcement agents to determine whether there is reason to believe that the person would defy a lawful subpoena.

We also question whether resort to a subpoena would always be preferred by a person holding evidence of a crime. Third parties may not in all instances prefer the active role required in complying with a subpoena to the relatively passive role they may take as custodians of materials sought by a search warrant. A subpoena may require an innocent person to take an active role in supplying evidence that will incriminate a family member, friend, long time associate, employer, or a person whom the possessor has reason to fear.

The proposed restrictions on all third party searches would also put an additional strain on the already limited resources of the criminal justice system. These proposals would require the government to litigate the issue of the suspect status of the possessor of the materials and the likelihood of their destruction if sought by supoena in those cases in which a search warrant was sought. As noted above, invoking the exceptions set forth in these proposals will necessitate extensive investigations heretofore unnecessary at a cost both of the expenditure of additional manpower and further intrusions into the privacy of innocent third parties. Furthermore, although the bases for refusal to comply with a subpoena are limited, litigation over enforcement of subpoenas which often includes extensive delays while appeals are taken, will burden both prosecutors and the courts. An additional problem which will arise in the enforcement of subpoenas was noted by the Court in Stanford Daily:

"Unlike the individual whose privacy is invaded by a search, the recipient of a subpoena may assert the Fifth Amendment privilege against self-incrimination in response to a summons to produce evidence or give testimony. See *Maness* v. *Myers*, 419 U.S. 449 (1975). This privilege is not restricted to suspects. . . . The burden of overcoming an assertion of the Fifth Amendment privilege, even if prompted by a desire not to cooperate rather than any real fear of self-incrimination, is one which prosecutors would rarely be able to meet in the early stages of an investigation despite the fact they did not regard the witness as a suspect." 436 U.S. at n.8.

The strain on the resources of the criminal justice system, together with significant risks that evidence will be destroyed or otherwise rendered unobtainable and additional intrusions into the privacy of innocent parties in our view plainly outweigh any benefits that the imposition of sweeping prohibitions on third party searches would have. The absence of federal abuse of third party search powers renders the imposition of these additional burdens on our ability to obtain evidence of crimes all the more unsupportable.

The same cannot be said of the limitations on searches of the press which were proposed in the Administration's bill. Where First Amendment activities are involved the balance must shift in favor of search restrictions. First, our proposed restrictions responded to what was articulated as a present, not a hypothetical problem: the *Stanford Daily* decision was and continues to be cited as creating a chilling effect on First Amendment activities. Second, like institutional record holders, members of the press generally do not come into possession of evidence of crimes by virtue of a sympathetic relationship with those who commit crime. They obtain such evidence as a result of their information gathering activities. Also, as is the case with institutional record holders, searches of the press are likely to entail extensive rummaging through numerous documents which is likely unnecessarily to compromise their confidentiality. Third, the press is uniquely unlikely to conceal, destroy or falsify information in their possession, for their very function is the publication of truthful factual accounts. Finally, the press is an identifiable class of third parties as to whom there has never been an instance in which it has been necessary for federal authorities to conduct a search.

I am concerned that the impetus for the proposed broad third party bills which have been introduced stems in part from a misunderstanding of current limitations both on the availability of search warrants and the manner in which they are executed. Certainly, misconduct by law enforcement officers in obtaining or executing a search warrant is all the more reprehensible where an innocent third party is involved. In this respect, the Fourth Amendment itself serves as the

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greatest protector of the rights of innocent parties. The probable cause requirements it sets forth preclude the use of governmental searches as a means of harassing innocent persons. The aggressive enforcement of Fourth Amendment rights by the courts whether in the context of criminal prosecutions or civil suits brought by persons aggrieved by improper searches is the most reliable protector against such abuse. In addition, federal law specifically limits the manner in which search warrants may be executed. Except in extremely limited exigent circumstances, searches may not be conducted at night nor may officers gain access by breaking down doors or enter without an announcement of their purpose and lawful authority. (See Rule 41(c)(1) of the Federal Rules of Criminal Procedure and 18 U.S.C. 3109). Thus current law already provides significant protection against unwarranted governmental searches and unnecessarily disruptive modes of executing searches, whether the occupants of the premises are in fact suspects, third parties, or their status or identity is unknown.

III. TITLES II AND III OF S. 1790—APPLICATION OF THIRD PARTY SEARCH RESTRICTIONS TO "PRIVILEGED" GROUPS AND DOCUMENTARY MATERIALS

The approach taken in Titles II and III of S. 1790 is something less than a prohibition on searches for all evidence in the hands of all third parties. Nonetheless, because the problems which are posed by these proposed provisions are severe, we would not be able to support their inclusion. Title II of S. 1790 would prohibit third party searches for materials which are considered "privileged". Title III of S. 1790 would prohibit third party searches for documentary materials. Thus Title III resembles Section 3 of H.R. 3486 which was reported out of the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice last month and which is expected to be the subject of action at the full Committee in the near future. Section 3 of H.R. 3486 differs from Title III of S. 1790 only inasmuch as it exempts from the definition of "documentary materials" contraband and the fruits and instrumentalities of crime.

The intended purpose of Title II of S. 1790 is apparently to protect confidential materials held by certain professional groups, but its impact will not be limited to the advancement of this purpose. We do not believe that such limitations on searches of third party "privileged" groups are either necessary or proper. As is the case with regard to third parties generally, there is simply no demonstrated pattern of abusive federal searches of professionals such as physicians, psychiatrists, or attorneys. Furthermore, the law enforcement problems cited above which will result from the enactment of a broad third party bill apply with equal force where the third parties to be protected are a class of professionals who may at times hold documents which are confidential. Of particular concern to us are the difficulties of determining in advance the involvement of such persons in criminal activity and the creation of sanctuaries for evidence. It is unfortunate but true that a significant number of federal prosecutions involve attorneys and physicians as defendants. Extending such protections to selected professionals will not only preclude our obtaining crucial and admissible evidence, but will also as a result ultimately insulate these persons from prosecution.

While the Department of Justice opposes such limitations on searches of third party professionals generally, I believe there are a number of significant problems peculiar to the approach taken in Title II of S. 1790. Title II of S. 1790 as introduced would make it unlawful to search for or seize documentary materials [10] which would be considered privileged "by the jurisdiction of the person in possession of the materials." The general rule precluding such searches would be subject to the same four exceptions made applicable to First Amendment non-work product materials in Title I of the bill.

It is not entirely clear on the face of Title II of S. 1790 how the existence of a privilege—and hence the lawfulness of a search—is to be determined for the bill speaks of the "jurisdiction of the person" as controlling, yet in our federal system persons are subject to both federal and state jurisdiction. However, it appears from the section-by-section analysis that accompanied S. 1790 that state evidentiary rules of privilege are to govern the permissibility of both state and federal searches.

[10] Both Titles II and III of S. 1790 refer to searches for documentary materials or "work product." Since work product is a subset of documentary materials and no separate standard is to govern searches for work product as opposed to non-work product documentary materials, the distinct reference to "work product" in these two titles is unnecessary.

The scheme for restricting searches for privileged materials set forth in Title II of S. 1790 is fundamentally at variance with the fact that the lawfulness of federal searches is and has always been governed strictly by federal law, and that in federal criminal prosecutions, it is federal, not state, law which governs the admissibility of evidence.[11] In contrast to the variety of privileges which are recognized by the states, few privileges are recognized in federal law,[12] and those which are recognized are narrowly construed. The federal courts' cautious approach towards liberal application of evidentiary privileges is based upon the principle that "these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *United States* v. *Nixon*, 418 U.S. 683, 709–710 (1974).

One anomalous result of the application of restrictions proposd in Title II of S. 1790 would be that federal officers would be precluded from conducting a search for materials that come within a state privilege that is not recognized by federal law. It is important to note that such documents if sought by a federal subpoena could not be withheld as privileged and would be admissible as evidence. Furthermore, not only would law enforcement officers (and ultimately federal courts) be charged with the difficult task of assessing the applicability of a state privilege—a determination which often rests on complex and subtle issues of law and fact—but in cases in which federal officers are conducting an interstate investigation or are transferred from one state to another, both of which are frequent occurrences, they will be assumed to be thoroughly familiar with the substantially differing rules of privilege of several jurisdictions.

Not only do rules of privilege vary considerably between the states, but within each state they are subject to constant judicial expansion and refinement. A recent New York case is illustrative of this problem. In that case, a New York court held that communications between a parent and his adult child are privileged.[13] This privilege is not recognized by the federal courts or by any other state, yet under the provisions of Title II of S. 1790, searches in New York for documents which might contain communications between parent and child would be prohibited. It is not appropriate to expect federal officers to anticipate such novel judicial expansions of the privilege doctrine, nor is it appropriate that federal law should embrace such unprecedented state court decisions.

What Title II of S. 1790 would provide, in short, is nothing more than a means of enforcing, through the mechanism of prohibiting search and seizure, a substantially inconsistent body of state statutes and court decisions regarding evidentiary privileges. No uniform federal policy would be advanced, for in enacting such legislation, Congress would be acting merely to facilitate the enforcement of state privileges that Congress and the federal courts have rejected as inappropriate as standards of the admissibility of evidence in federal criminal proceedings. In the case of state searches, these provisions would impose on the states a mode of enforcing privileges which the states themselves have not deemed necessary or appropriate.

I would also note that the limitation of the application of Title III of S. 1790 to documentary materials does little to mitigate the law enforcement disabilities which will arise from the imposition of prohibitions on third party searches. Access to documentary evidence is crucial to obtaining conviction in many federal prosecutions, particularly those in the priority areas of white collar and organized crime. The reasons for providing protection to documentary materials in the Administration's bill do not apply in the context of a restriction on searches of all third parties. Two of the primary reasons for our choice of extending protection to documentary materials were, first, that these communicative materials are central to the First Amendment values we sought to protect, and second, to address the problem of "rummaging" that can occur when the premises to be searched contain vast amounts of documentary materials which are both confidential and unrelated to the ongoing investigation. These con-

[11] See, e.g., *United States* v. *Gillock*, —— U.S. —— (Mar. 19, 1980) ; *United States* v. *Meagher*, 531 F.2d 752 (5th Cir. 1976, cert. denied, 429 U.S. 853, and *United States* v. *Craig*, 528 F.2d 773 (7th Cir. 1976), cert. denied, 425 U.S. 973, rehearing 537 F.2d 957, cert. denied, 429 U.S. 999.

[12] For example, while a physician-patient and accountant-client privilege is recognized in some states, neither is recognized by the federal courts. See, e.g., *United States* v. *Meagher*, supra, note 2 (no physician-patient privilege recognized in federal criminal trials), and *United States* v. *Wainwright*, 413 F.2d 796 (10th Cir. 1969), cert. denied, 396 U.S. 1009 (accountant-client privilege not recognized in federal courts.

[13] *People* v. *Fitzgerald*, —— N.Y.S. ——, 26 Crim. L. Rep. 2273 (1979).

siderations do not apply to third parties generally. Certainly, the government's interest in obtaining probative documentary evidence is no less than its interest in gaining access to other kinds of evidence. In addition, the problems of alteration, concealment, and destruction of evidence apply with equal if not greater force to documentary evidence.

IV. CONCLUSION

For the foregoing reasons, the Department of Justice strongly urges that the Committee approve Titles I and IV of S. 1790 but that it not impose any additional limitations on third party searches beyond the area of First Amendment activities. The Administration's proposal, which is embodied in Titles I and IV of S. 1790, was the result of months of deliberation by a Department of Justice task force which addressed the problem of an appropriate legislative response to the issues raised by the *Stanford Daily* decision. In the course of these deliberations, we thoroughly examined the extension of search protections to all third parties and to selected classes of "privileged" persons or confidential communications. We concluded that on balance search restrictions were merited and were tolerable from a law enforcement standpoint where vital First Amendment interests were implicated, but that any further extensions of limitations on third party searches would severely curtail our ability to investigate and prosecute federal crimes and would be completely unwarranted in light of the absence of any evidence of federal abuse of third party search powers. Indeed, it is our view that the broad third party search proposals represent an overreaction to a privacy concern that in the two years following the *Stanford Daily* decision has not been borne out by any demonstrated incidents of federal abuse. Such sweeping prohibitions on third party searches which will produce the adverse effects described above are firmly opposed by the Department of Justice.

U.S. DEPARTMENT OF JUSTICE,
CRIMINAL DIVISION,
OFFICE OF THE ASSISTANT ATTORNEY GENERAL,
Washington, D.C., May 2, 1980.

Hon. BIRCH BAYH,
Committee on the Judiciary,
U.S. Senate,
Washington, D.C.

DEAR SENATOR BAYH: This letter is in response to a number of questions which were posed by you and Senator Mathias relating to my testimony on S. 1790. I will first address the issue of third party searches prior to the *Zurcher* decision, and then turn to the question of the application of the "mere evidence" rule and the questions you posed concerning searches of doctors' and lawyers' offices.

I. PRE-ZURCHER THIRD PARTY SEARCHES

During my testimony at the hearings which you chaired on March 28, 1980, on S. 1790 and related legislation placing restrictions on third party searches, Senator Mathias expressed the view that the decision in *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978) represented a break with prior Fourth Amendment precedent or practice. I indicated, to the contrary, that it is the Department of Justice understanding that the Fourth Amendment law had always been as the *Zurcher* opinion announced it, i.e. that it is not necessary to show that the premises to be searched or thing to be seized are owned or possessed by a person as to whom there is probable cause to believe is implicated in the offense under investigation. I promised to support this view with some examples of pre-*Zurcher* searches directed at the premises or property of innocent parties.

Although our research has not been exhaustive and is still continuing, the following cases illustrate that, so far as the federal courts are concerned, it has never been deemed a requisite for a valid search that a particular person be identified as having probably committed an offense or that a search could not, without more, be directed against a person not shown to be so implicated: *Steele* v. *United States No. 1*, 267 U.S. 498 (1925) (sustaining search of garage premises where there was probable cause to believe illicit whiskey was present; the affidavit for the warrant, set forth in the opinion, nowhere purports to con-

nect any person with the offense) ; see also, to the same effect, *Carroll* v. *United States*, 267 U.S. 132, 158–159 (1925) (sustaining search of automobile containing illicit liquor; the Court stated: "The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law.") ; *Schenck* v. *United States*, 249 U.S. 47 (1919) (sustaining search of premises of Socialist Party headquarters and seizure of documentary evidence not in defendant's possession therefrom) ; *United States* v. *Feldman*, 366 F. Supp. 356, 362–363 (D. Haw. 1973) and cases cited therein (sustaining an anticipatory search warrant for premises to which contraband would later be delivered; the court stated: "[I]t is not necessary to identify any particular person or persons as being responsible for the presence of the contraband in a residence to search for and seize that contraband. All that is needed is probable cause to believe that the contraband is there. . . . The recipient might well be completely innocent, yet the warrant may still be executed") *United States* v. *Manufacturers National Bank of Detroit*, etc., 536 F. 2d 699, 702–703 (6th Cir.), cert. denied, 429 U.S. 1039 (1976) (sustaining search of relatives' safety deposit box for gambling receipts and records constituting evidence of defendant's crime; the court explicitly rejected the contention made by the newspaper in *Stanford Daily* that as "innocent and uninvolved third parties, [the persons in whose names the safety deposit box was registered] were deprived of their Fourth and Fifth Amendment rights due to failure of the government to utilize a subpoena duces tecum or demonstrate its impracticability before applying for a warrant. The court held: "Once it is established that probable cause exists to believe a federal crime has been committed a warrant may issue for the search of any property which the magistrate has probable cause to believe may be in the place of concealment of evidence of the crime. The necessity that there be findings of probable cause as to two factors—the commission of a crime and the location of evidence—affords protection from unreasonable searches and seizures, which are the only ones forbidden by the Fourth Amendment."). Indeed, the model search warrant form which appears in the Appendix of Forms following the Federal Rules of Criminal Procedure contains no provision for the identification of the owner or occupant of the premises to be searched or the custodian of the objects to be seized. This form has not been amended since 1948.

One reason for the relative difficulty in locating a large number of cases discussing third party searches is the fact that criminal defendants generally do not have standing to raise the issue of the validity of third party searches. However, an overview of cases which discuss the standing issue indicates that third party search warrants were issued prior to the *Zurcher* decision: *Combs* v. *United States*, 408 U.S. 224 (1971) (search warrant issued for stolen whiskey located on defendant's father's farm) ; *United States* v. *R. A. Haes*, 551 F. 2d 767 (8th Cir. 1977) (search warrant issued for obscene films located at freight office) ; *United States* v. *Wells*, 437 F. 2d 1144 (6th Cir. 1971) (search of third party's home for stolen coin collection) ; *United States* v. *Sacco*, 436 F. 2d 780 (2d Cir, 1971), cert. denied, 404 U.S. 834 (third party search warrant issued for stolen televisions) ; *United States* v. *Wexler*, 4 F. 2d 391 (5th Cir. 1925) (third party search warrant issued for seizure of alcohol located in warehouse). In neither these cases nor any others discussing the circumstances in which a defendant may challenge a third party search of which we are aware is there any suggestion that third party searches are constitutionally impermissible.

The authorities cited above of course do not address the propriety of legislative proposals to restrict some species of third party searches. They do, however, underscore the fact that such restrictions would be novel and indeed unprecedented in federal jurisprudence, and they confirm the accuracy of the *Zurcher* majority opinion's assertion that "As heretofore understood, the [Fourth] Amendment has not been a barrier to warrants to search property on which there is probable cause to believe that fruits, instrumentalities, or evidence of crime is located, whether or not the owner or possessor of the premises to be searched is himself reasonably suspected of complicity in the crime being investigated." Viewed in this context, in which *Zurcher* is seen not as a break with the past but as a perpetuation of original Fourth Amendment doctrine, it is our position that proposals for broad restrictions on such searches, applicable to all third parties or to so-called "privileged" categories of persons, or that otherwise go beyond

the First Amendment area reached by S. 1790 as reported, are unnecessary and would unjustifiably threaten the vital interests of law enforcement.

As noted previously, our research on this matter is continuing. If we discover any further significant authorities bearing on this question, we shall transmit the information to the Committee for use in its deliberations.

II. APPLICATION OF THE "MERE EVIDENCE" RULE AS A MEANS OF PROTECTING PRIVACY INTERESTS

Senator Mathias and you posed the question whether the operation of the "mere evidence" rule, adopted by the Supreme Court in *Gouled* v. *United States*, 255 U.S. 298, 310 (1921), and later repudiated by the Court in *Warden* v. *Hayden*, 387 U.S. 294 (1967), would have precluded searches for evidentiary materials such as reporters' notes and psychiatric records, and, if so, whether it could fairly be said that the decision in *Standford Daily* allowed searches of a more privacy intrusive nature than had theretofore been thought allowable. An examination of the decisions applying the *Gouled* distinction between "mere evidence" which was not a permissible object of a search and fruits, instrumentalities, and contraband which could be lawfully seized, indicates that the "mere evidence" rule would not have provided such protection with any consistency.

In *Warden* v. *Hayden*, the Court condemned the "mere evidence" rule as a distinction "more attributable to chance than considered judgment" and "wholly irrational, since depending on the circumstances, the same 'papers and effects' may be mere evidence in one case and 'instrumentality' in another." *Supra*, at 302, 308. Prior to *Warden* v. *Hayden's* discrediting of the *Gouled* distinction, the "mere evidence" rule had come under severe criticism by courts and commentators alike. See, e.g., *Gilbert* v. *United States*, 366 F. 2d 923 (9th Cir, 1966), cert. denied, 388 U.S. 922; *Matthews* v. *Corea*, 135 F. 2d 534 (2d Cir. 1943); Note, 54 *Geo. L.J.* 593 (1966); Kaplan, 49 *Cal. L. Rev.* 474 (1961); Comment, 20 *U. Chi. L. Rev.* 319 (1953). Indeed, prior to the Court's decision in *Warden* v. *Hayden*, the "mere evidence" rule had been rejected in unanimous decisions by the highest courts of California and New Jersey. *People* v. *Thayer*, 63 Cal. 2d 635, 408 P. 2d 108 (1965); *State* v. *Bisaccia*, 45 N.J. 504, 213 A. 2d 185 (1965).

Our research indicates that no items of evidence, not even patient records, were uniformly categorized as "mere evidence" and thus immune from search. In *United States* v. *Lindenfield*, 142 F. 2d 829 (2d Cir. 1944), cards containing patient records were held to be "instrumentalities of the crime of issuing illegal prescriptions. The court reasoned that "the cards were more than mere evidence of the crime. They were the means through which the defendant hoped to cover up his illegal acts, and thus were a vital factor in the criminal enterprise itself." *Id* at 832. A similar rationale was utilized in *Marron* v. *United States*, 275 U.S. 192 (1927), to uphold the seizure of ledgers, receipts, and utilities bills, despite the fact that the very items deemed not subject to seizure in *Gouled* were bills and contracts.

Such inconsistency pervaded court decisions applying the "mere evidence" rule. Opposite results were reached in nearly identical Prohibition Act cases involving the seizure of books, records, and other papers: *Foley* v. *United States*, 64 F. 2d 1 (5th Cir. 1933) (books and records deemed instrumentalities); *Bushouse* v. *United States*, 67 F. 2d 843 (6th Cir, 1933) (books and records deemed to be merely evidentiary). Similarly, a seized address book was held to be a "fruit" of crime in *Matthews* v. *Corea*, *supra*, but solely evidentiary in *United States* v. *Lerner*, 100 F. Supp. 765 (N.D.Cal. 1951).

The confusion generated by the *Gouled* distinction is illustrated by the variety of types of evidence which were held to be "instrumentalities", including letters (*United States* v. *Poller*, 43 F.2d 911 (2d Cir. 1930); a passbook indicating the deposit of the proceeds of a bank robbery, (*United States* v. *Howard*, 138 F. Supp. 376 (D.C. Md. 1956)); a list of property to be smuggled (*Landau* v. *United States Att'y for So. Dist.*, 82 F. 2d 285 (2d Cir. 1936)); guest checks seized in a brothel (*United States* v. *Boyette*, 299 F. 2d 92 (2d Cir, 1962), cert. denied, 369 U.S. 844); and even the shoes of a fleeing felon (*United States* v. *Guido*, 251 F.2d 1 (7th Cir. 1958), cert. denied, 356 U.S. 950).

Not only was there considerable uncertainty about what would constitute solely evidentiary materials under *Gouled*, but the underlying rationale for the distinction was far from clear. See, Comment, 20 *U.Chi.L.Rev.* 319, 322–330 (1953) and cases cited therein.

One reason advanced in support of the *Gouled* distinction was the mere fact that because this rule may have reduced the total number of permissible searches, it served to protect privacy interests. As the Court noted in *Warden* v. *Hayden*, a similar argument could be used to justify an arbitrary determination that searches could be conducted only on specified days of the month. 387 U.S. at 309. The fact of the matter is that, as the case illustrations set forth earlier demonstrate, the "mere evidence" rule bears little, if any, relationship to the privacy consideration underlying the Fourth Amendment, which is that an individual's interest in privacy need surrender to the societal interest in securing evidence of crimes only when an impartial magistrate determines that there is probable cause to believe that a crime has been committed and that specific evidence of that crime is located at the premises described in the warrant.

The fact that there was no clear, rational basis for the "mere evidence" rule provided yet another means for the courts to circumvent the arbitrary strictures of the rule. For example, in *Gilbert* v. *United States*, 366 F. 2d 923 (9th Cir. 1966), cert. denied, 388 U.S. 922, the seizure of a photograph of the defendant was upheld, despite the fact that it was solely of evidentiary value, because the court held that the application of the rule would be confined "to those situations where it will clearly serve the purpose upon which it is said to be based." *Id* at 932–933. Finding that none of these purposes would be served in the circumstances of the case, the court upheld the seizure of the photographs and the admission of the out of court identification of the defendant based on the seized photographs.

In sum, while the "mere evidence" rule would, in all probability, have operated to reduce the number of searches of the type you pose, it cannot be said that such searches consistently would have been precluded by the rule as applied by the courts. Either on the basis of a finding that a particular search did not run afoul of the purported purposes of the rule or on the basis of an expansive interpretation of what constituted fruits or instrumentalities of a crime, searches for materials which in retrospect may appear to be solely evidentiary were with some frequency held permissible during the reign of the ill-conceived *Gouled* distinction. Such a result is not surprising, and, I believe, clearly supports the purely historical point I was making, and you were questioning, at the hearing—namely that the *Stanford Daily* decision was not a break with the past but rather a reaffirmation of longstanding Fourth Amendment law and practice. This is not offered as an argument against any legislative reconsideration or response to the *Stanford Daily* decision. On the contrary, the Department's support for the carefully limited response represented by the Administration bill remains intact. The historical perspective is relevant, however, in assessing the desirability of extending a legislative repudiation of the result in the *Stanford Daily* case itself to all third party searches. As we have previously indicated, such an extension would overturn two hundred years of constitutional understanding, law, and practice, and would have significantly adverse consequences for law enforcement.

III. FEDERAL SEARCHES OF DOCTORS' AND LAWYERS' OFFICES

You posed several questions regarding the frequency and the existence of specific procedures to govern federal searches of doctors' and lawyers' office. We cannot supply a definitive answer to your question about the number of such searches prior to and since the *Zurcher* decision, since the Department does not compile statistics on the number and nature of executed search warrants.

However, in our discussion at the hearing on S. 1790, I indicated that I believed that the number of such searches, particularly those which would be characterized as third party searches, is quite low. Two informal surveys we have conducted support the validity of this assessment. In January of 1979, we received responses from twenty United States Attorneys to a request for information regarding the frequency of third party searches of "privileged" groups such as attorneys, physicians, and psychiatrists. Only three such searches were cited, and one involved a case in which the physician whose office was searched was a suspect in an insurance fraud scheme. In addition, one United States Attorney responded that he was "considering" the use of a search warrant to obtain evidence believed to be held by an attorney.

In February of this year in response to a request by Representative Kastenmeier to ascertain the validity of allegations that ten lawyers' officers in Chicago

and Las Vegas had been searched in the period immediately following the *Zurcher* decision, the files in the FBI field offices in Chicago and Las Vegas were reviewed. No record of a search warrant served on any lawyers' offices during that time was found. In addition, preliminary inquiry of the Philadelphia Field Office did not reveal any search of a lawyer's office since June 1978. Similar inquiry of the New York and Miami Field Offices revealed only two cases, remarkably similar on their facts. In both cases the FBI executed a search warrant on a suite of offices in which a "boiler room" operation involving fraudulent sales of gold, silver, and oil options was being conducted. In both cases, a subject of the investigation had made the claim that he is an attorney serving as a general counsel to the subject company and that the search, within the confines of what appeared to be solely a business operation, included a search of his office that was allegedly in violation of attorney-client privileges. Investigation in the Miami case has determined that the subject is not a member of the Florida bar.

I would stress that both of these surveys were informal and did not involve an exhaustive review of a case-by-case basis. However, I believe they indicate that I was correct in stating that searches of attorneys' and doctors' offices by federal officers are relatively infrequent.

You also inquired whether, in light of the Department's increased emphasis on white collar and organized crime, we foresaw a corresponding increase in the number of searches of doctors' and lawyers' offices. I doubt that there would be such a result, unless there were a significant rise in the number of such professionals engaging in these types of criminal activity. Nor do I foresee any increase in the number of third party searches. However, the enactment of legislation which would create havens for evidence—and I believe that this would be the unfortunate impact of the imposition of broad restrictions on third party searches—would encourage the depositing of evidence of crimes with third parties, and thus increase the number of instances in which a third party search may be the only means of securing crucial evidence.

Statistics provided to the Department by the Magistrates Division of the Administrative Office of United States Courts indicate that there was no significant increase in the number of federal applications for search warrants in the year following the *Zurcher* decision:

Time period:	*Search warrant applications*
July 1, 1978 to June 30, 1979	4,606
July 1, 1977 to June 30, 1978	4,491
July 1, 1976 to June 30, 1977	5,203
July 1, 1975 to June 30, 1976	6,068
July 1, 1974 to June 30, 1975	5,563
July 1, 1973 to June 30, 1974	5,649

While these statistics do not reveal the type of premises searched from year-to-year, they do support our contention that the application of informal Justice Department policies has caused the search warrant to be a carefully considered investigative tool rather than an implement of abuse, and that its use in recent years has actually declined rather than proliferated.

Finally, the Department does not now have any formal procedures or guidelines which govern searches of doctors' or lawyers' offices. However, as I indicated in my testimony, the Department is not adverse to pursuing a discussion of the feasibility of such guidelines with the Committee.

Sincerely,

PHILIP B. HEYMANN,
Assistant Attorney General,
Criminal Division.

[The prepared statement of Oliver B. Revell follows:]

PREPARED STATEMENT OF OLIVER B. REVELL

Senators and members of the Judiciary Committee staff, I appreciate the opportunity to discuss, on behalf of Director Webster and the Federal Bureau of Investigation, the proposed Privacy Protection Act of 1979. Assistant Attorney General Heymann has expressed the urgent concern of the Department of Justice that the sweeping restrictions on third-party searches would effectively put essential evidence beyond reach in a significant number of criminal cases.

On a regular basis, we are invited to testify before a number of committees of Congress on a variety of issues. Just a few weeks ago, the FBI testified in general support of S. 1717, the proposed amendment to Title III of the Omnibus Crime Control and Safe Streets Act of 1968. The amendment would add certain judicial controls over surreptitious entries and expand the statute to include coverage in life threatening situations. We fully supported that amendment except for a small portion wherein three words carried a real probability that the criminal element would obtain information allowing them to effectively negate the purpose of the statute. As this position would indicate, we are certainly cognizant of and sensitive to the privacy interests of individuals.

I will limit my remarks to Titles II and III of S. 1790.

It is our firm belief that Titles II and III, if passed into law, would create a virtually impenetrable haven for secreting evidence by the criminal element and also create a privileged class of evidence, i.e., documentary, the type of which currently is critical to the successful prosecution of corruption, organized crime, and white-collar crime cases. Mr. Heymann and others who have testified on this subject in both House and Senate hearings have stated that there has been no demonstrated Federal abuse of the Fourth Amendment vis-a-vis third-party searches. Our whole investigative experience, reinforced by a limited review of searches conducted by our major offices over the past two years fully supports that finding. We concur with Mr. Heymann, and it is fully supported in our investigative experience, that we cannot and must not assume that third parties who possess evidence of a crime will be willing to comply with a subpoena. As a practical matter, those third parties who come to possess evidence of a crime, are almost always associated, either by family, friendship, or professional relationship with those who are subjects of an investigation.

The characterization "innocent third party" as used in the introduction of this bill is a misnomer but an excellent rhetorical technique. The "third parties" we generally come in contact with are more accurately described as "questionable third parties" at the time we become aware that evidence is in their possession; however, their involvement often becomes very clear as the investigation progresses. There is another category of third parties, although not involved criminally, who can be expected to thwart the subpoena process due to loyalty to the subject.

Even though this proposed amendment would apply only to "innocent" third parties, it must be recognized that it is often difficult, especially at the early stages of an investigation, to determine the identity of suspects and co-conspirators. Recent focus upon the incidence of criminal activity on the part of doctors (particularly in illegal drug distributions and medicare fraud) and lawyers (who may engineer or serve as conduits for illegal financial transactions) renders the problem of defining "innocent" third parties particularly severe if protections are extended to these groups.

Again, we must reiterate that search warrants are most often used in the beginning stages of an investigation and usually before any overt investigation has been conducted or evidence has been presented to a Grand Jury or, in many cases, before a Grand Jury has been seated to hear evidence; thus precluding the issuance of a subpoena.

The purpose of a search warrant is to seize evidence of a crime, either committed or being committed. The law requires a warrant must be specific as to items that can be seized and the scope of the search must be outlined. A search warrant is not accusatory of anyone. It appears that a primary purpose of this proposed legislation is to prohibit "rummaging" through personal papers unconnected with an investigation. "Rummaging" has a pejorative connotation and is not reflective of the training of our Agents or of our searching techniques. Current law provides appropriate remedies when law enforcement officers, in bad faith, exceed the scope of the warrant. The exclusionary rule is well-known to our Agents and our searches are conducted accordingly.

There are two objectives to the proposed Titles II and III that, in our opinion, are so overwhelming that we request the drafters reconsider and reject what initially started as a well-intentioned effort to protect innocent citizens. The first of these is that the "third party" exclusion will create a sanctuary for evidence of a crime that the criminal will discern immediately and turn to his advantage. With the assistance of attorneys, or bookkeepers, or other erstwhile professional advisors, the criminal will insure that evidence of a crime is

stashed safely in his parents' home, or a relative's home, or a friend's home or office, or the next door neighbor's garage, or in the warehouse of a corporation, or in the trunk of the criminal's wife or husband's car, . . . etc., etc. The criminal is not likely to say to his next door neighbor "Here is a box full of records describing my securities fraud, or my narcotics operation, or my loansharking empire but, if you get a supoena for these documents, you must turn them over to the Government." The real world does not operate that way. The criminal will say, "Let me know immediately so I can remove or destroy them", or the criminal will have established a "no question asked" relationship with the receiver of documentary evidence and because there will have been a relationship (either family, business, friendship, or acquaintance) established, the receiver of the evidence will, notify the target that a subpoena has been issued. Even if we were able to surveil the subpoenaed location for the days, the weeks, and possibly months between the issuance of the subpoena and a final resolution in the courts, documentary evidence, because of its nature, can be destroyed or removed without our knowledge.

We have learned, in case after case involving organized crime, that it is an accepted technique to store evidence of a crime in the residence or on the property of a family member or friend. Even without this proposed legislation, organized crime has found such locations to be a relatively safe sanctuary for fruits, instrumentalities, documents, and other evidence of a crime. The very small number of "third party" searches conducted by the FBI reflects the difficulty in penetrating the "third party" relationship to obtain probable cause for a search warrant. The enactment of a general "third party" exclusion would signal the criminal element that a nearly perfect sanctuary exists to hide their crimes.

The second overwhelming objection to Titles II and III of the proposed legislation is that it would be creating a privileged class of evidence (documentary) which is peculiar to the upper echelons of those involved in public corruption, organized crime, and white-collar crime. The nature of organized crime and white-collar crime conspiracies is such that documentary evidence is essential to the successful investigation and prosecution of the orchestrators of these crimes. When investigating the leaders of organized crime, we are seldom searching for the smoking gun, or the narcotics syringe, or the tools of a burglar. It is the higher levels of criminal conspiracies that most often use documentary materials to either record their illegal profits, or keep score in their loansharking operation, or direct their fraudulent schemes. Thus, we see the anomalous result that access to evidence usually associated with the leaders of large criminal conspiracies is more restricted than access to evidence associated with the "street" criminal. The criminal mind will immediately recognize the creation of a loophole for protecting their activities that will quickly spread among them throughout this country.

It would be incorrect to assume that subpoenas are immediately available to investigative officers for any legitimate investigative purpose. Subpoenas are not available at all stages of an investigation or prosecution. Often, the FBI conducts investigations for months before a Grand Jury is empaneled. In many areas, Federal Grand Juries do not sit continuously. Also, a Grand Jury subpoena cannot be used to continue to gather evidence after indictment. Subpoenas are not available in many fugitive cases because the subject is either already indicted or the case is not under consideration by a Grand Jury. Because of these gaps in the availability of subpoenas, a prohibition of searches may leave investigators and prosecutors with no judicially enforceable investigative process.

We cannot conclude this testimony without observing that there will be considerable costs (both time and manpower) in successfully invoking the suspect and destruction exception. The exceptions require substantial knowledge of the relationship enjoyed by an "innocent third party" and the subject of our investigation. This will require a probe into the nature of friendships or the closeness of family ties. These probes could expand to include the nature of husband/wife relationships. Serious questions will arise over joint control and/or ownership of property resulting from marriage or business relationships. As Assistant Attorney General Heymann observed, this does not seem to serve privacy interests. If Titles II and III are passed, it is our firm belief that law enforcement officers, prosecutors, and judges will be wrestling with complex legal issues for years to come.

Attached are examples of cases that would be effected by the proposed legislation.

ATTORNEY IMPROPERLY ATTEMPTS TO THWART SUBPOENA

In an ongoing case, an attorney was served with a subpoena for records he was holding as a third party. He held these records for an associate attorney who had been murdered. Defense attorneys for the alleged murderer attempted to block the subpoena claiming the Government had no right to third party documents. In the course of this investigation, we have learned that one of the defense attorneys has on two occasions atempted to persuade the "third party" attorney to discard the documents in question.

RICHARD FUSCO, GREGORY DIPALMA, WESTCHESTER PREMIER THEATRE, ET AL., RICO

In this case, in which a number of organized crime members were convicted, there was a conspiracy to hide proceeds from the theatre during a time it was in bankruptcy. The defendants used bogus tickets printed by independent printers to accomplish this. Although probable cause existed for the issuance of a search warrant for certain documentary evidence held by the independent printers and a wararnt was applied for, the U.S. Magistrate refused to issue the warrant on the grounds that it was against his policy to issue a search warrant on third parties until the subpoena procedure had failed to secure the records. After subpoenas were issued, the principals of one printing business appeared before a Grand Jury, but did not provide evidence as required by the subpoena. Later, it was determined that one of the owners of the printing business was a close relative of a defendant in the case and was also under investigation by another Government agency for counterfeiting violations.

The fact that a search wararnt was not issued denied the Government valuable evidence in this prosecution.

MARK ROBERT BURTON, ANTHONY EDWARD VENEZIANO, GLEN WILBY, ROBERT L. BROWN, DBA VIDEO CITY, LAFAYETTE AND SAN MATEO, CALIFORNIA, INTERSTATE TRANSPORTATION OF STOLEN PROPERTY—MAIL FRAUD CONSPIRACY

Based on allegations received by legitimate video cassette retailers during August of 1975, San Francisco instituted an undercover operation which resulted in the purchase of several feature films from captioned business in violation of Federal Copyright Statute. During the course of conversations with a subject. it was revealed that all business records, mailing lists, pertinent documents, etc., were maintained at the residence of the owner, Brown. Accordingly, in September, 1979, search warrants were executed by Bureau Agents at four locations including Brown's residence. Documentary evidence seized from this location resulted in the direct implication of Brown as well as others. Furthermore, information contained in the seized sales invoices and mailing lists were instrumental in establishing other Federal felony violations to include interstate transportation of stolen property, conspiracy, and mail fraud. It is believed that the issuance of the subpoenas in this matter would have been ineffective and that the only viable alternative was the use of search warrants. Consequently, there is little doubt that captioned subject would have destroyed or concealed all physical evidence if given the opportunity normally offered by a subpoena.

BANK FRAUD AND EMBEZZLEMENT MATTER

A Grand Jury subpoena was served on the attorney for the subject to produce the records of a company in early December 1979. This subpoena was served because the branch manager of a savings and loan association had embezzled approximately $1.4 million and funneled the funds to the account of another company. The subpoena called for production of documents and business records to establish the audit trail for the embezzled funds.

The attorney advised he would be unable to comply with the date of appearance before the Grand Jury and was granted a three week extension. He again did not comply and subsequently advised FBI Agents he did not intend to appear nor would he allow his client's records to be examined. A subpoena has now been obtained for the attorney himself to appear before the Grand Jury.

FBI investigation indicates that the subject continues to engage in criminal activity despite the knowledge that he is under investigation. No estimate can be made of potential economic loss which might have been prevented had the records of the company been obtained as the full extent of the subject's activity is as yet unknown.

COURIERS

In numerous cases involving both organized crime and white-collar crime investigations, couriers are used for the transportation of records, messages, and currency. Sometimes, through informant or other information, we are made aware that a courier will be leaving a certain location and arriving at another location. Often, the informant is not aware of the courier's identity or of the courier's involvement in transporting certain materials. When an informant or other source of information is able to detail that the materials are involved in a criminal violation, we are often able to apply for a search warrant and seize those materials. Since, as I stated above, we are often unaware of the courier's identity and/or participation, a subpoena would be required under the proposed legislation. The very circumstances of the use of a courier would indicate that, as a minimum, the courier would be trusted to carry out the assignment and would be unlikely to comply with the terms of the subpoena.

Senator MATHIAS. Our next witness will be Mr. Nathan Lewin, with the distinguished Washington law firm of Miller, Cassidy, Larroca & Lewin.

TESTIMONY OF NATHAN LEWIN, ESQ., MILLER, CASSIDY, LARROCA & LEWIN, WASHINGTON, D.C.

Senator MATHIAS. Mr. Lewin, do you have a prepared statement?

Mr. LEWIN. I have prepared a statement that I delivered to the committee staff late last evening. I would not propose to read all of it.

Senator MATHIAS. Well, your statement will appear in full in the record at the conclusion of your oral testimony.

Mr. LEWIN. Right.

Senator MATHIAS. We are glad to have such oral exposition as you would care to make at this time.

Mr. LEWIN. Thank you.

I would like to summarize some portions of that statement though, because I think it is directly relevant to the exchange that you just had, Senator Mathias, with Mr. Heymann on the underlying theory of what the Court has decided heretofore, and what I think is appropriate legislation at this time.

I appear before this committee not as a representative of any group, organized or otherwise, but as a litigating attorney who was, prior to entering private practice more than 10 years ago, a Federal prosecutor and an advocate for the United States in criminal cases before the Supreme Court.

I have taught constitutional law at Harvard Law School, where I was a visiting professor in 1974–75, and as an adjunct professor for several years at Georgetown Law School.

While at Harvard I also organized and taught one of the first full-fledged courses given at any major law school on the lawyer's role in the defense of white-collar crime. The problems which are presented to the committee and that have grown out of *Zurcher* v. *Stanford Daily* are within my particular field of interest. That is why I really appreciate the committee's invitation to testify.

The fact that there have been a considerable number of different legislative proposals and that even the Department of Justice's Criminal Division is supporting some form of statutory remedy demonstrates the consensus that something must be done to prevent the recurrence of a search of the kind which the Stanford Daily suffered in April 1971.

The difficult questions really are whether the bill is only to be, as Mr. Hymann put it, "a first amendment bill," or whether it ought to deal with the problems of privacy presented by the *Stanford Daily* case. That affects how far such Federal legislation can reach and how far it should reach.

The answer to that question depends, as is true of many legal issues, on where one begins. If one starts with the proposition that searches and seizures of documentary material should be part of law enforcement's routine investigative arsenal, one would view every legislative restriction on that power as a concession to lawlessness in our society.

If, on the other hand, it is only a last resort—a governmental intrusion that should be tolerated only when more civilized methods are likely to fail, then one should impose statutory limitations.

Contrary to what Mr. Heymann stated to the committee, I think that the framers of the fourth amendment viewed the power of Government agents to make unannounced appearances at one's door and demand unconsented entry to secure papers or effects as an extreme invasion of personal liberty. They could not prohibit such invasions altogether because they knew that in administering the law peace officers had to exercise this power to search and seizure.

But the words they selected for the fourth amendment have no parallel elsewhere in the Constitution. They spoke of the fourth amendment's protection of the people's "right to be secure" as if it preexisted and would endure beyond the Constitution itself. They didn't verbalize this right in any more specific way than by prohibiting "unreasonable searches and seizures" and by establishing a mechanism that would reduce the possibility of abuse. They prescribed procedures such as the requirements of probable cause, an oath or an affirmation, and a particular description of the place to be searched and the persons or things to be seized.

But the necessary inference was that the power to come to a house and demand unconsented entry was legitimated only reluctantly, and that it was deliberately hedged about with multiple safeguards.

Mr. Heymann's statement that a search is not an uncivilized process indicates that he has not had exposure to people who have been subject to searches and seizures or who have had police officers arrive at their home, whether it is daytime or nighttime, and demand to be allowed entry and to seize documents or any other material which is within the home.

Another historical fact which must be borne in mind is that for almost 200 years—until the Supreme Court decided *Warden* v. *Hayden*—Government agents were constitutionally prohibited from exercising the power to search and seize anything other than contraband and the fruits or instrumentalities of crime.

So it was assumed during this entire period that unannounced entry into a private home or office, even with a warrant based on sworn testimony, could be carried out only to seize property which was illegally possessed, which had been obtained by criminal conduct, or which was so intimately involved with the commission of a criminal offense that it was an instrumentality of a criminal act. Documents which could be of use in proving guilt, such as financial records or correspondence, were "mere evidence" and could not constitutionally be the subjects of a search and seizure.

This I think really answers the point that Senator Mathias asked of Mr. Heymann. Over 200 years of history, it is true, searches may very well have been executed upon third parties. But during those 200 years of history, searches were limited to seizure of contraband or of fruits or instrumentalities of crime.

So that even if the Justice Department comes back to you, Senator Mathias, with many cases, as I think they will, which indicate that searches were executed on nonsuspects, I think you will find they were executed under the *Warden* v. *Hayden* standard which covered only contraband or fruits or instrumentalities of a crime.

Senator MATHIAS. And they are clearly distinguishable.

Mr. LEWIN. They are clearly distinguishable because they were issued for that very limited objective. They indicate that during those 200 years all that the Federal Government thought it could seize was fruits of crime or narcotics or illegal whiskey, that kind of thing. For that you could issue a search warrant and seize it whether it was held by a suspect or by a nonsuspect.

Senator MATHIAS. But that, as I tried to express to Mr. Heymann, is very different from going into a psychiatrist's office——

Mr. LEWIN. Absolutely.

Senator MATHIAS [continuing]. Or a lawyer's office and just riffling through the files at will.

Mr. LEWIN. I think you are right in saying that it is different—not because the psychiatrist is a third party, but because what you are looking for is different.

If the psychiatrist had narcotics in his office, if he had dollar bills which were obtained from a bank robbery which his cousin gave him, you could get it and you could have gotten it 100 years ago, under a search warrant, even if he is a psychiatrist and even if he is a lawyer.

One of the principal points I would like to make here this morning is that it misses the point to talk about a suspect and a nonsuspect. That sets up a strawman which is too easy for the Justice Department to knock down, and it was too easy for the Supreme Court to knock it down in *Zurcher* v. *Stanford Daily*.

From the vantage point of the litigators in *Zurcher* v. *Stanford Daily*, it made good sense. I am a litigating lawyer. When you are up in the Supreme Court, you argue the narrowest ground you have to win your case.

Stanford Daily said, "We are not a suspect. How can they come in and search our offices?" They hoped the Supreme Court would buy that point, as the lower court had.

The Supreme Court rejected it. Its rejection was based on the fact that there is no difference between a suspect and a nonsuspect.

I think history demonstrates that. The Department of Justice comes in here and says to you, in terms of implementing a law that distinguishes between suspects and nonsuspects, we'll find great difficulty in doing that.

But the real question ought to be:

Should a search warrant be issued and executed on anyone, whether he be a suspect or a nonsuspect, without the Government agent stating in a sworn affidavit that the warrant is needed because otherwise the evidence will be destroyed and stating some evidence in support of it?

That is the whole issue really, isn't it? Whether the Government has to state in an affidavit, and provide probable cause to believe—and that is a very minimal standard—that the evidence will be destroyed.

Now, all the hypotheticals that Mr. Heymann and Mr. Revell have proposed were all instances, I submit to you, where, if what they told you had been told to a judge in an affidavit, a search warrant could have been issued to obtain that material.

Take the case of the sister, Mr. Heymann's illustration here. The sister who has a hit list. The sister of the organized crime figure. The Department of Justice has whatever information they have regarding the particular individual who is the focus of attention. If they know there is a "hit list," an actual list—and I submit that happens very seldom that organized crime figures write out lists of whom they decide to assassinate and how much they decided to pay——

Senator MATHIAS. Any more than U.S. Senators write down their hit list.

Mr. LEWIN. But the point is, what if they did it and the Department of Justice knew it, and they put it into an affidavit? If they said: "We know or we have on reliable information from an informant who has delivered reliable information in the past, that such a hit list was held by Mr. X, and we have from that same reliable informant that he has given it to his sister, and the list being on one piece of paper, if the sister is served with a subpena, she will destroy it."

There is no judge in the country who would not issue a search warrant to get that hit list. That is all a bill would require. A bill should say that of anybody—whether Mr. X himself has the hit list, whether his sister has the hit list, whether his lawyer has the hit list or whether a psychiatrist has the hit list.

The point is that all a bill would do is it would say to the Government, "Put it in an affidavit and subject it, in an ex parte proceeding, to the scrutiny of a judge, of a magistrate. Tell him what your basis is for believing that that evidence will be destroyed. If it is sufficient, if it meets the very low standard of probable cause, the judge will issue the warrant and will enable you to do it."

But if not, the Constitution does not permit the intrusion on privacy when you have an alternative. Let's not talk about hit lists. Let's talk about what Mr. Revell said is the more usual problem of books and records. From my experience of 10 years in private practice—and I have defended suspects and witnesses in white-collar crime investigations—what the Government ordinarily wants is stacks and stacks of books and ledgers and correspondence and all that sort of thing.

There is no reason to believe in the ordinary case that anyone, be he a suspect or a nonsuspect in such in investigation who is served with a grand jury subpena, and who knows it is a violation of Federal criminal law—obstruction of justice and various other violations of Federal criminal law after you have been served with a grand jury subpena—would, in those circumstances, destroy the documents.

I have represented clients who have been served with grand jury subpenas and they turned over the information. I have had a chance to review it. I have had a chance to copy it. I have had a chance, if I thought it was appropriate, to move to quash in a court of law, and the documents have been turned over to the Government.

I have had cases where the prosecutors have subsequently presented those documents to a grand jury and have obtained indictments. That is due process of law.

Senator MATHIAS. What you are really saying is that the documents that may be of some use in proving guilt——

Mr. LEWIN. Yes.

Senator MATHIAS. [continuing]. Financial records, correspondence, ledgers, that kind of material, are evidence, and are not constitutionally the subjects of search and seizure.

Mr. LEWIN. Well, I think since *Warden* v. *Hayden* they are constitutionally subject to search and seizure. I think *Warden* v. *Hayden*, which the Supreme Court decided, overruled prior law and the Supreme Court recognized that it overruled——

Senator MATHIAS. But not until that time.

Mr. LEWIN. Not until that time.

Senator MATHIAS. It was not constitutionally subject to search and seizure.

Mr. LEWIN. As Justice Stevens said in his separate opinion in *Zurcher* v. *Stanford Daily*, the Stanford Daily problem arose largely because of *Warden* v. *Hayden*. I think it was somewhat unanticipated, but at the time of *Warden* v. *Hayden*, the Court simply viewed the question as whether there should be an exclusion for mere evidence from a constitutional rule, and the Court said, "No."

I think the Court did not then anticipate that what would happen is that it might open the door to attempts to obtain, by search and seizure, lots of documentary evidence. That is the problem that is now presented and that is now before this committee.

Senator MATHIAS. What you are saying is really what Justice Stevens noted, that *Zurcher* was the first time that the court had an opportunity to consider the kind of showing necessary to justify the vastly expanded degree of intrusion that is authorized by the opinion in *Warden* v. *Hayden*.

Mr. LEWIN. Precisely. That is right.

Senator MATHIAS. That is really why we are all here today.

Mr. LEWIN. That is I think why we are here.

I submit that the Department of Justice would like to make this all appear to be a first amendment problem, and that is wrong. There is a large fourth amendment problem here, as you noted in your exchange with Mr. Heymann.

And, I think what the fourth amendment really requires and what the Congress can constitutionally do, is to say that the fourth amendment has prohibited unreasonable searches and seizures when Government agents can secure evidence by a means other than a search and seizure which carries with it less of an intrusion on privacy. They have their duty to secure it by this alternative means, unless they can demonstrate, in an ex parte proceeding, with a paragraph or several paragraphs in an affidavit, in support of a search warrant, that attempting to secure documents by subpena is ineffective, because it will be destroyed. They have to state their reasons for it.

Now Mr. Heymann and the Department of Justice argue in circles in various ways. On the one hand, I think the letters and the sub-

missions made to you say, "There has been no problem. We have done this. We have pursued evidence by subpenas duces tecum."

I can tell you, in terms of practicing in this field, that's right. That is usually what Federal prosecutors do. They serve subpenaes duces tecum, usually.

What this legislation does though, is it deals with two problems. It doesn't deal with 95 percent of the cases and the large overwhelming amount of current practice.

What it is designed to do is precisely to prevent abuses. No matter what Mr. Heymann may say sitting here, there are, around the country, 72 U.S. attorneys offices. There are hundreds of assistant U.S. attorneys with great discretion.

I can tell you—and maybe this strikes home somewhat—I can tell you that our office is representing a local legislator who was subject to a search, where a subpena would have done equally well. It was a search of his office and of other offices. People came totally unannounced to the offices to search through legislative records and records relating to his employees.

Now that was an abuse, but it was an abuse that the Department of Justice can't control, at least at present. The search is over. It is finished. The invasion of privacy is all completed.

Nonetheless, with all the good statements and declarations of intention that the Department of Justice may have to this committee, that happened. And the interesting thing is that when the Department of Justice actually took a poll of its U.S. attorneys—that appears in the record of the prior transcript before this committee—although it had said, "Well, we usually use subpenaes and we don't use searches," it was rather striking that—and this appears at page 345, of the transcript of the prior hearings—that there were 11 districts out of 72 which had used third-party searches in between 10 and 20 percent of its cases.

Now that, I submit to you, is a very high percentage if you consider the total number of cases that U.S. attorneys handle. If you consider that 15 percent of the offices use third-party searches in more than 10 percent of their cases.

Most of these bills are limited to third-party searches. I put to you that the distinction between third party and suspect is an artificial one. It was born of the necessity of litigation, of the fact that the parties in the *Stanford Daily* case tried to make the narrowest case for the Supreme Court. The Supreme Court knocked it down.

The Supreme Court has never considered the question whether a search warrant is constitutional and reasonable when a subpena duces tecum is equally available.

That is the issue really with suspects and with nonsuspects. If you have a perfectly law-abiding suspect, if you like, who is a target of investigation——

Senator MATHIAS. And that question has not been decided in 200 years.

Mr. LEWIN. I think that question has not been decided by the Supreme Court ever.

The interesting thing is in *Zurcher* v. *Stanford Daily*, section 2 of the opinion, focused only on the distinction between suspects and nonsuspects.

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The Supreme Court said there is no distinction between suspects and nonsuspects. Mr. Heymann has said to you, "We can't draw that distinction."

I put to you as a practicing lawyer, I think it is an unfair distinction in various ways. You are putting entirely in the mind of the prosecutor this critical distinction that the law will turn on.

In other words, if the prosecutor says, "I am targeting X," then he can go and have his agents knock on X's door and demand his books and records without the probable cause to show that they may be destroyed.

But if the prosecutor says, "This is X's sister and we are not targeting X's sister," then she is subject to the law.

I agree that whether X is a suspect, whether the person on whom the search is being made is a suspect, is a significant element in the possibility of destruction. I don't question that.

I think an agent should be able to say in his affidavit, "We want to do the search on Mr. X's home, and we have been investigating Mr. X for the last 7 months. He has been the target of an investigation. He has these documents in his house. That is why we think he will destroy it." The judge ought to look at it and determine on the basis of that whether to issue a warrant.

But I do not believe that there should be an automatic dispensation for nonsuspects.

I don't want to take up a lot of the committee's time, but Mr. Revell attached to his statement a list of very specific cases which, he thinks demonstrate that search warrants are needed.

Well, I went through that list, just in the few minutes that I was sitting in the back of this room. It seemed to me that from almost every one of those cases I could draw the contrary conclusion. Those cases sometimes involve situations in which the Government still does not know whether records actually exist. One is a bank fraud case in which they say there have been no compliance. They did not obtain certain records, and they only suspect that the records may exist.

Another is a case in which they did in fact issue a search warrant. They obtained the documents and it appears from what they have said, that under the test that I am proposing, they would have been able to get a search warrant because there was a target of the investigation who had the documents in his home, and who they had reason to believe would destroy it.

Legislation that would say to them, "Put in your affidavit your reasons for thinking the documents are going to be destroyed" would not have affected that case.

And then, he discussed a case in which they say, "Subpenaes were issued, there was somewhat of a delay and then the principals of a printing business appeared before a grand jury, but did not provide evidence as required by the subpena."

If these principals were guilty of contempt, they didn't provide the evidence, then I suppose all these people could be prosecuted for contempt or obstruction. That is what appears to be overlooked in all of this.

The FBI and the Department of Justice talk about the difficulty of prosecuting white-collar crime. I can tell you, at least from my own

experience, white-collar crime defendants are represented by and large by very reputable law-abiding attorneys.

When their clients are served with subpenas, they are told by their lawyers, "Look, you have to produce the documents. Now let's make up a list of what they are. Let's look through them. Let's make copies of them."

Now, that is not a minor consideration. The Government would like to be able to come in and take documents, disappear with all of an individual's documents, by just subjecting them to a search.

I have been confronted by situations in cases where I don't even know what the Government has taken. The Government may have taken documents by seizure. They provide a cursory inventory, and I don't know the documents that have been taken. Only if the U.S. attorney is kindly inclined, does he even let me look at the documents.

Minimal due process, I think, requires that anybody whose large number of ledges and books and documents are taken should be given the opportunity to review those documents with his attorney and keep copies of those documents. This is what a subpena does.

But the Department of Justice, by seizing, evades the possibility even of permitting those whose documents are taken to have copies retained.

Finally, this bugaboo of endless litigation and lawyers filing motions that delay things and appealing things. I think this is just not possible. The courts have held that appeals are not permitted from grand jury subpena orders which deny a motion to quash. You can't appeal from an order denying a motion to quash a grand jury subpena unless you are willing to risk contempt, unless you are ready to go to jail.

Very few clients are willing to do that. So you get one shot in a court of law before a district court, to raise your objections. You get an opportunity to negotiate with a U.S. attorney if his demand is too broad, and what he wants to seize is too broad.

None of that is provided by search and seizure. The Government comes in, and it may take cartloads of documents. Your only opportunity is if you are ever indicted, to move to suppress that kind of evidence.

That, I submit, is entirely unsatisfactory.

My statement goes into much greater detail on this subject, and directs attention to very specific questions, such as whether State action or State searches should be covered as well as Federal searches. I think it can and should be done under the fifth clause of the 14th amendment.

But I think I will just submit that statement for the record.

Senator MATHIAS. Let me ask you just a couple of very, very brief questions. Who do you think ought to be sued for violations of the kind of bill you propose?

Should it be the individual agent solely? Or should the individual and the Government entity that employs him be jointly and severally liable.

Mr. LEWIN. The reason for putting the individual in there as somebody that could be sued, is to provide a greater deterrent effect, Senator Mathias.

I think from the vantage point of the party who has been injured, I think he would expect that any recovery would probably come from the Government.

I have also represented the Jewish Defense League members who are suing the former Attorney General, Mr. Mitchell, for an illegal wiretap.

Quite frankly, it is only because we anticipate that ultimately maybe the United States may be liable that the suit is worth bringing. I don't know what Mr. Mitchell's assets are, and the chances are that individual police officers' assets will not be substantial enough to warrant a law suit.

But I do think it is important that the law have a deterrent effect. I think it ought to include the individuals, but only if there is no exclusionary rule provision.

I suggest in my statement that there might well be an exclusionary rule provision in such a bill, because I think that is the most effective deterrent.

Senator MATHIAS. Should there be a good faith defense?

Mr. LEWIN. Well, if you have an exclusionary rule I suppose you have to show some sort of bad faith. I think for Governmental liability, good faith ought not to be a defense, because I think the Government ought to be put in the framework where it will make sure that its agents live up to the standards of the law and that they know what the facts are. Good faith is too easy a defense, based on ignorance. That issue, by the way, is one I am hoping the Supreme Court will agree to hear in the Jewish Defense League case, the availability of a good faith defense.

Senator MATHIAS. Should the governmental employer have available any defenses that are available to the individual?

Mr. LEWIN. I think the governmental employees' defenses should be far less than those available to the individual. The important point is that at some point the individual in these circumstances should be able to know that he can get compensation, that a lawsuit is worth while, that hiring an attorney and bringing a lawsuit is worth while. And the Government ought to know that it will cost the Government something.

I think that the range of defenses should be much less for an individual than for the Government. I think there should be almost no defense for the Government really. If there is a violation of a law, an individual ought to be able to sue. One of the problems, I think, is that the courts don't recognize that an individual whose right of privacy has been infringed upon, is hurt in the same way as an individual whose arm is broken in an automobile accident or whose leg is cut off in an injury. It is a personal injury.

The law says you can sue somebody and be compensated if your arm is broken. Why can't you sue somebody and be compensated if your privacy has been unlawfully invaded by Government agents?

Senator MATHIAS. Let me ask you one further question. The Judiciary Committee takes note of the fact that the distinguished firm of Miller, Cassidy, Larroca & Lewin does a lot of pro bono work.

Mr. LEWIN. Thank you.

Senator MATHIAS. We don't want to ride the willing mare too hard, but I would hope that you would agree to work with the committee in further consideration of this legislation.

Mr. LEWIN. I would be delighted to. I think it is really a very important issue. I think it is unfortunate, really, that the Government views it as being only a first amendment problem rather than a privacy one.

Senator MATHIAS. Thank you very much.

Mr. LEWIN. Thank you.

[The prepared statement of Nathan Lewin follows:]

PREPARED STATEMENT OF NATHAN LEWIN

I appear before this Committee today not as a representative of any group, organized or otherwise, but as a litigating attorney who was, prior to entering private practice more than ten years ago, a federal prosecutor and an advocate for the United States in criminal cases before the Supreme Court. I have taught constitutional law at Harvard Law School, where I was a Visiting Professor in 1974–1975, and as an Adjunct Professor for several years at Georgetown Law School. While at Harvard I also organized and taught one of the first full-fledged courses given at any major law school on the lawyer's role in the defense of white-collar crime. The problems which are presented by the Supreme Court's decision in *Zurcher* v. *Stanford Daily* and by the various bills now before this Committee are, therefore, within my particular field of interest, and I appreciate the Committee's invitation to testify at this time.

Let me skip over the preliminaries. The fact that a considerable number of different legislative proposals have been offered and that even the Department of Justice's Criminal Division is supporting some form of statutory remedy demonstrates the consensus that something must be done to prevent the recurrence of a search of the kind which the *Stanford Daily* suffered in April 1971. The difficult questions facing the Committee are really questions of degree. How far can such federal legislation constitutionally reach and how far should it reach? The answers to many of those questions depend—as is often true of legal issues—on where one begins. If one starts with the proposition that searches and seizures of documentary material should be part of law enforcement's routine investigative arsenal, one would view every legislative restriction on that power as a concession to lawlessness in our society. Every time the police are disabled from executing a search that could produce evidence, there has been, under this thesis, a defeat for law enforcement.

If, on the other hand, a search and seizure is viewed only as a last resort—as a gross governmental intrusion on privacy that should be tolerated only when other more civilized methods of securing evidence are likely to fail—statutory limitations become desirable. Only if the law effectively forces prosecutors and police consciously to exhaust alternative means of securing evidence can abuses of the kind shown by the record in the *Stanford Daily* case truly be prevented.

Having sketched these opposite starting points, I should confess that I am with the second group. I believe that the Framers of the Constitution viewed the power of government agents to make unannounced appearances at one's door and demand unconsented entry to secure "papers or effects" as an extreme invasion of personal liberty. They could not prohibit such invasions altogether because they knew that in administering the law, peace officers often had to exercise the power to search and seize. But in words which find no parallel elsewhere in the Constitution they spoke of the Fourth Amendment's protection as the peoples' "right . . . to be secure"—as if it pre-existed and would endure beyond the Constitution itself. The Framers were unable to verbalize the constitutional right in any more specific way than by prohibiting "unreasonable searches and seizures" and by establishing a mechanism that would, in their judgment, reduce the possibility of abuse—i.e., the requirements of probable cause, an oath or affirmation, and a particular description of the place to be searched and the persons or things to be seized. The necessary inference to be drawn from the language and structure of the Fourth Amendment is that the power to search and seize was legitimated only reluctantly, and that it was deliberately hedged about with multiple safeguards.

One other historical fact must be borne in mind. For almost two hundred years—until the Supreme Court decided *Warden* v. *Hayden*, 387 U.S. 294, in 1967—government agents were constitutionally prohibited from exercising the power to search and seize anything other than contraband and the fruits or instrumentalities of crime. Thus it was assumed during this entire period that unannounced entry into a private home or office, even with a warrant based on sworn testimony, could be effectuated only to seize property which was illegally possessed, which had been obtained by criminal conduct, or which was so intimately involved with the commission of a criminal offense that it was an "instrumentality" of the criminal act. Documents which could be of use in probing guilt, such as financial records or correspondence, were "mere evidence" and could not constitutionally be the subjects of a search and seizure.

One other consideration should be mentioned before we turn to the particular problem at hand. No one—federal officials least of all—can assert that the power to search and seize is the only means provided by the law for obtaining documentary evidence. The usual method, as Assistant Attorney General Heymann has conceded from the inception of this inquiry, is by subpoena. In the federal system, prosecutors and enforcement personnel of federal agencies issue grand jury subpoenas routinely when they want documents—whether they seek them from a "target" of an investigation or from a third-party custodian. In most state and local jurisdictions, law-enforcement personnel have subpoena power. Sometimes subpoenas are immediately enforceable in the sense that a recipient of a subpoena must comply or file a motion in court to quash or limit the subpoena. In other instances, the agency issuing the subpoena must enforce it by going to court and securing a judicial order if the served party refuses to comply. In either event, however, the person or entity having custody of the documents knows what is being sought and is able to assert legal rights in a court of law in advance of any surrender of the documents. And the documents are actually obtained by the more civilized procedure of a peaceable transfer of custody, rather than being seized against the will of their custodian.

If we were writing on a *tabula rasa*, it would make much sense, in light of this generally available alternative remedy, to say that the word "unreasonable" in the Fourth Amendment's prohibition upon "unreasonable searches and seizures" prohibits a search whenever an alternative means—such as a subpoena—could be used to secure the same evidence. It would be reasonable to require any application for a search warrant to state why the drastic invasion of privacy resulting from a search and seizure is necessary. Just as one element of reasonableness, which has been incorporated into the Federal Rules of Criminal Procedure, is that no night-time searches may take place unless "reasonable cause" requires entry at that hour, it would be sound constitutional policy to prohibit any unconsented search for evidence unless the applicant for the search demonstrates "reasonable cause" to believe that alternative procedures not requiring an invasion of privacy would be ineffective.

I suppose one must conclude from the result of *Zurcher* v. *Stanford Daily* that the Supreme Court is not prepared to read this requirement into the "reasonableness" clause of the Fourth Amendment. It is, I think, one of the accidents of history that the broad question whether a search for documents is reasonable if there are methods available other than an invasion of privacy to secure those documents was decided in a case in which the interested party, moved by the exigencies of litigation, pressed for a much narrower constitutional rule.

Sections II, III and IV of the majority opinion in the *Stanford Daily* case state reasons, more or less persuasive, why third parties should not be treated differently under the Fourth Amendment than anyone suspected of complicity in a criminal offense and why the press is not entitled to greater protection against searches than any other custodian of documents. The attorneys for the newspaper had concluded, in the sound exercise of tactical judgment, that the Supreme Court would be more likely to accept a constitutional rule limited to third parties or a principle limited to the press than countenance any across-the-board exemption from searches where subpoenas or other procedures which allow for a prior adversary hearing are available. But as a result of this tactical choice, the Court has not articulated the reasons why a search warrant is a reasonable, and therefore permissible, means for securing documents when those same documents can practically be obtained by a *subpoena duces tecum*.

Here is where Congress' power to legislate comes in. Obviously, Congress has power to set reasonableness standards for searches by federal officers, and it may

declare that no federal officer should apply for a search for documents, and no federal judicial officer should issue a warrant for such a search, unless there is "reasonable cause" to conclude that alternative means of securing the documents, such as by *subpoena duces tecum* are unavailable or are impractical. (For reasons which I will state later, I believe that Congress probably has the power to define reasonableness for state searches as well.) The fact that the custodian of the documents is himself suspected of complicity in the criminal conduct being investigated—and that he may therefore destroy or transfer the documents—may be one very significant element in such a showing of "reasonable cause." But I do not believe that it makes sense to establish a statutory distinction between suspects (who are denied the rights provided by the law) and third-party custodians (to whom the law alone applies). That distinction is, I believe, entirely a creature of litigation necessity—it was devised by lawyers for parties in litigation who were trying to persuade courts to adopt the most narrow rule which could produce a favorable outcome.

In my own litigation practice of more than ten years, I have represented targets of criminal investigations as well as third-party witnesses. Federal prosecutors have almost invariably sought and obtained documents from my clients by issuing grand jury subpoenas to them. This has afforded me an opportunity to review the documents requested, to make copies of those which are turned over, and to object to those parts of a subpoena which call for papers that are privileged or otherwise beyond the proper scope of a government demand. These minimal procedural rights—including even so mundane a matter as making and retaining a copy of documents which are produced—are, in my view, essential to due process for suspects and even for those who are not themselves targets of an investigation. A search and seizure is not only an invasion of privacy; the government's peremptory taking of documents pursuant to an unconsented search has the unfair consequences of depriving their custodian of an opportunity to review of what is being taken, to maintain an accurate record of what the government takes, and to challenge in court, before custody of all the documents changes, whether the government is entitled to all it seeks. Such a challenge cannot, however, delay the grand jury process too long. In the federal system courts have held that denial of a motion to quash a grand jury subpoena is not ordinarily applicable. Thus, unless the subpoenaed party is ready to risk imprisonment for contempt, appeals are not possible.

If federal prosecutors generally issue *subpoenas duces tecum* to targets of their investigation, as well as to third parties, why all the shouting? Why is a law needed? This paradox is heightened by Assistant Attorney General Heymann's letter of February 25, 1980, to Representative Kastenmeier and by the Justice Department's earlier submissions, most of which have told the Congress that this legislation is unnecessary because federal officials "abide by a policy of restraint" in the use of search warrants when other less intrusive means are available to obtain materials which are sought. One could as well ask Mr. Heymann why he is concerned that the Congress may enact legislation which would put into statutory form—with an exception when probable cause can be shown—a policy which the federal government follows in any event.

The answer to the paradox on both sides lies, I believe, in the report of the survey conducted by the Department of Justice among its U.S. Attorneys, which was sent to Senator Bayh under date of August 21, 1978, and which appears at pages 345-348 of this Committee's printed hearings. It seems that of 72 responding Offices, only 23 could say that they had never used third-party searches, and 11 of the 72—in excess of 15 percent—have used them in 6 to 20 percent of their cases. The fact is that notwithstanding the Department of Justice policy, warrants have and are being executed upon third parties who have custody of evidence which a prosecutor deems useful.

The purpose of this legislation—in light of history and the representations made to Congress—is obviously not to change what is being done 90 to 95 percent of the time. Most prosecutors will probably continue to be civilized if no legislation whatever is enacted, and no one expects searches to replace subpoenas as the routine method of securing documents. But if the gap opened by the Supreme Court's opinion is not closed, there will be a handful of prosecutors, both federal and local, whose zeal will carry them beyond civility and good sense and who will utilize all the power that the law gives them. If the law entitles them to obtain a search warrant and to seize large quantities of documents from a suspect or from third parties rather than having to confront legal objections to a grand

jury subpoena, a number of prosecutors will justify taking that course. And once a search has been consummated and privacy invaded, the harm has been done.

The Justice Department's fears over restrictions on law enforcement are, I think, exaggerated. First, all the proposed bills I have seen provide that when there is a tangible fear—which can be rationally explained—that material being sought will be destroyed, altered or otherwise affected, a warrant may be issued. No one is preventing law-enforcement officials from seizing any evidence peremptorily so long as they state a rational and sustainable reason for doing so in an affidavit submitted *ex parte* to a judicial officer.

The Justice Department makes a curious argument when it says that legislation restricting searches which applies to third-party custodians other than the press "will effectively preclude" the securing of evidence during the early stages of an investigation because the identities of the suspects are not then firmly established. To me, the fact that an investigation is in this early stage, when many innocent persons are within the dragnet of the inquiry, militates against wholesale invasions of privacy at that juncture. Surely the issuance of grand jury subpoenas to all individuals or entities which are within the target area is the appropriate means to secure documents at such an early stage. Execution of a number of search warrants is a drastic and overboard remedy when the particular target is unknown.

Let me be clear on one point, however. My presentation here today deals largely with documentary evidence—not contraband or fruits of crime. The pre-*Warden* v. *Hayden* distinction makes sense to me in the context of this problem. Congress could and should recognize that when there is probable cause to believe that a person possesses contraband or the fruits of crime, the civility of a subpoena is overridden by the significant likelihood that the contraband or booty will disappear if advance notice is given. I have somewhat more of a problem when "instrumentalities of the offense" are involved. Imaginative prosecutors have been able to make "mere evidence" look very much like instrumentalities of crime," and I fear that a total exception for instrumentalities would swallow the rest of the law. Conversely, any evidence that truly is so close to the crime that it is a real "instrumentality" can be shown to be more susceptible to destruction or alteration than other kinds of evidence. Consequently, the general principle which entitles the prosecution to use a search warrant when it can demonstrate "reasonable cause" or "probable cause" to believe that the evidence may be destroyed could be invoked and this particular evidence might, in individual cases, justify use of the search warrant.

There is one other extraordinary statement made in the Department of Justice's opposition that requires comment. Assistant Attorney General Heymann asserts that recourse to a subpoena is not always possible because many law enforcement agencies do not have subpoena power and because subpoenas may be obtained only when a grand jury "is conducting an investigation in contemplation of handing down an indictment." I believe that most federal agencies do have the power to issue either summonses or subpoenas. And in my experience, federal prosecutors fill out and serve grand jury subpoenas without seeking leave of a single grand juror. The subpoenas are, of course, returnable on their face only on a day when the grand jury is in session. But I have known grand juries to be called in specifically for a single witness. Moreover, in the usual case, a federal prosecutor who has served someone with documentary evidence will permit the witness or his attorney to deliver the documents to the United States Attorney's office at a mutually convenient time. Only rarely is document production actually done in the presence of grand jurors. Finally, there is surely no substance to the suggestion that a grand jury subpoena may issue only "on contemplation of handing down an indictment." Grand jury subpoenas are issued routinely as the very first step in the investigation of a white-collar crime, when no one knows whether an indictment will ever result.

Now that I have summarized my views on some of the broad questions, let me turn, in conclusion, to the major specific questions concerning the scope of the proposed legislation which now confront the Committee:

(1) *Should legislation cover state, as well as federal, searches?*—My answer to this question is "yes." Virtually all the reasons of Fourth Amendment policy which apply to federal law enforcement apply, as well, to the States. The only counter-arguments are that such legislation may exceed Congress' constitutional powers and that some jurisdictions may not have as many alternative means

for securing documents as federal prosecutors have. So far as the Constitution goes, I agree with constitutional experts such as Professors Paul Bender and William Cohen who rely on the Fifth Clause of the Fourteenth Amendment as the source for Congress' authority. My rationale is even simpler than Professor Bender's. I think that Congress may define what constitutes "unreasonableness" within the meaning of the Fourth Amendment, and it may say that the availability of an alternative procedure for securing evidence renders a search unreasonable. That is the legislative finding upon which a federal law may prescribe the procedures to be used by state officers to protect the rights "incorporated" by the Fourteenth Amendment, including the Fourth Amendment's right of privacy.

The assertion that States may not have equivalent subpoena powers may be handled by delaying implementation of the Act for a period of time to enable local jurisdictions to enact authorizing legislation. The problem is really presented, I believe, only in a small number of jurisdictions, and they could avail themselves of this grace period to amend local law.

(2) *Should legislation protect all custodians rather than protecting only the press?*—My answer to this question is "yes." Although I believe that the press have certain unique privileges which grow out of its status as the channel of communicating information to the public, the right to be free of an unnecessary invasion of privacy does not uniquely belong to the press. A search of a newspaper such as the *Stanford Daily* carries with it, above and beyond the Fourth Amendment violation, a "chilling effect" on First Amendment rights. But the principal vice is one which the press shares with everyone else.

Indeed, if anything, the privacy interests of institutional custodians of records (which the Justice Department appears more ready to protect) are far less serious than the privacy interests of individuals. If a search and seizure were conducted upon the premises of a bank, or on the premises of the Washington Post, the uproar might be louder but the impact on privacy would be much less than if a private home or office were subjected to an unconsented entry.

(3) *Should legislation protect all custodians of documents or only third parties?*—The farthest that any proposed bill heretofore offered has gone is to protect all third parties. I do not agree with that limitation, promising as it may have been thought by the advocates in the *Stanford Daily* case. As the Justice Department's opposition indicates, the line between a suspect and a third party is often an unclear one. The Supreme Court has rejected that distinction, and I think it is not really a useful one in terms of the realities of the criminal process. The important policies which this proposed legislation implements, however, affect all those who possess documents which prosecutors may want, and the law should protect all such custodians. Judicial officers may, and properly should, be persuaded that suspects are more likely to do away with evidence, but that should be a matter of decision-making in individual cases.

(4) *Should legislation cover all evidence rather than excluding contraband and fruits of crime?*—I have already explained why I favor an exception for contraband and booty. Here, I think, there is room for an irrebutable presumption of destructability. The same may be true of instrumentalities, and possibly even of other non-documentary "mere evidence." Surely the focus of the problem in the area of white-collar crime are books, records, correspondence, etc. And as to these, a provision defining the statute as encompassing "documentary materials" would do the trick.

(5) *Should legislation grant only a civil damage remedy against the government agency?*—Since all the proposed legislation deals only with third parties, the Exclusionary Rule is not a part of any proposed statute. By excluding the personal liability of any offending official and, at the same time, rendering evidence admissable, these laws do little to deter violation. Ultimately the Exclusionary Rule remains the best hope for inducing compliance with such a law. Police officers who fear that they will not be able to use what they have secured under an unnecessary search warrant will take the safer course and serve a subpoena.

Consequently, I believe that to be effective, the law should permit any party against whom the prosecution introduces evidence seized under an unnecessary search to object to its admission. It would, of course, be anomalous to give greater rights in these cases to exclude evidence seized from third parties than the Supreme Court has granted in cases where a totally unlawful warrantless search is conducted. And the Court has been very restrictive in recognizing a party's

"standing" to object to evidence seized in an unlawful search. But let me suggest that if a bad-faith standard were incorporated into this law, permitting a defendant to exclude evidence if he shows that a search warrant was secured even though the officer consciously knew that the material could be secured by subpoena, such a provision would have a meaningful deterrent effect. It might also serve as a model for an intermediary position to be taken by courts and legislatures in the usual case of an unlawful search.

(6) *Should legislation vary from the "probable cause" standard?*—The Justice Department's proposed bill fixes two different standards of proof—"probable cause to believe" that the custodian of the sought material is a suspect and "reason to believe" that the material would be destroyed or altered. The second sounds suspiciously similar to the "reasonable cause to suspect" standard in the customs laws, which was the subject of Supreme Court consideration in *United States* v. *Ramsey*, 431 U.S. 606 (1977), where the Court held that it imposed "a less stringent requirement than that of 'probable cause' . . . "Probable cause" is a modest enough standard, and if a prosecutor's belief that evidence will be destroyed or altered is strong enough to warrant the intrusion on privacy of a search, he should be able to express his suspicion sufficiently to meet the "probable cause" standard. I would not, therefore, deviate from that recognized quantum of proof.

Senator MATHIAS. Our next witnesses will be a panel representing the Fourth Estate, Mr. Charles W. Bailey, editor of the Minneapolis Tribune, representing the American Society of Newpaper Editors; Mr. Douglas Watts, representing, American Newspaper Publishers Association, Reston, Va.; Mr. Robert Lewis, president, Society of Professional Journalists; Mr. John Landau, executive director, Reporters Committee for Freedom of the Press; and Mr. J. Laurent Scharff, general counsel, Radio Television News Directors Association.

TESTIMONY OF CHARLES W. BAILEY, EDITOR, MINNEAPOLIS TRIBUNE, AMERICAN SOCIETY OF NEWSPAPER EDITORS; DOUGLAS WATTS, AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION; ROBERT LEWIS, CHAIRMAN OF THE FREEDOM OF INFORMATION COMMITTEE, SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI; JACK C. LANDAU, EXECUTIVE DIRECTOR, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; AND J. LAURENT SCHARFF, GENERAL COUNSEL, RADIO TELEVISION NEWS DIRECTORS ASSOCIATION

Senator MATHIAS. We will ask Professor Kanter to come later, after this panel.

Gentlemen, you are all professionally used to expressing yourselves in crisp, concise, clear ways. If you have statements, they will all be printed in full in the record as if delivered, at the conclusion of your oral presentation.

I might ask you to confine your oral comments to no more than 5 minutes each, perhaps less if possible.

Mr. BAILEY. Thank you, Mr. Chairman.

I am Charles W. Bailey, editor of the Minneapolis Tribune. I appear on behalf of the American Society of Newspaper Editors. I came the farthest and I have the farthest to go before I sleep tonight, so my colleagues have agreed to let me go first.

Senator MATHIAS. Literate as always.

Mr. BAILEY. I am a little uneasy being here, first because I am a layman in a den of lawyers, and second, because I spent too many

years at that table where the reporters sit to be comfortable at this one.

Senator MATHIAS. It serves you right.

Mr. BAILEY. Yes, sir.

Senator MATHIAS. It is time we got you there.

Mr. BAILEY. It seems to me that there are two or three things to say:

At least as a layman, on the basis of the disagreements here this morning, it appears to me that it is not at all clear that the powers the Justice Department seeks to preserve for itself are powers it had between 1791 and 1978. I am glad the committee is going to look further into that.

Second, it is fine to talk about organized crime, and when we talk about examples, that makes good copy. But the fact is that the case and the Supreme Court holdings that bring us here had to do with a newspaper office and a doctor's office.

Finally, the question arose earlier about the value of legislation that applies only to Federal officers. We believe that such legislation is extremely valuable because it is exemplary and because it is influential on the States.

As the committee is no doubt aware, editors all over the country were alarmed by the decision of the Supreme Court in *Stanford Daily*.

We testified here in 1978, and in the House in 1979, in support of remedial legislation. The Society's board of directors has asked me to reaffirm that position.

We think the *Stanford* decision represents a very serious threat to the right of citizens generally to be secure from unannounced and unreasonable police search, as well as being a serious threat to the operation of a free press.

And in using the term "free press," I mean to include all forms of publishing: Books, magazines, broadcasts, photographs, films, and other forms of public communication, as well as traditional newspapers.

Our reservations about a press-only approach stem from two beliefs. First, we believe that the American press should in general try not to ask for special legislation. Many of us believe that a proper interpretation of the first amendment gives us all the protection we need. Mr. Heymann may not be embarrassed to seek a "first amendment only" bill, but some of us are. We believe that the rights of the press are rights that belong to all citizens.

Second, we believe that the rights of others are as much infringed by this decision as are the rights of the press. So most of us prefer broad legislation to protect not only the press but all other citizens, something like S. 115, for example, which was introduced last year by Senator Mathias.

We regret the administration has not supported broad legislation. We agree with the position taken in *Stanford* by the district and circuit courts and by Mr. Justice Stevens. We think it would leave Federal and State officials with adequate tools to enforce the law. I would just say here that I think the fourth amendment was not intended to make life easy for police and prosecutors, but rather to protect citizens against abuses of governmental power.

The *Stanford* decision does have a special and immediate effect on the press. I cite just for a moment our own case. The Minneapolis Tribune, like many other newspapers, has taken steps to protect its confidential files, and those of its staff members, from the kind of surprise, sweep-and-rummage search legitimized by the court in *Stanford.* It is one of the minor ironies of the climate that now exists in American newsrooms that it seems prudent for me not to know where the confidential notes and working papers of my reporters are kept.

All I do know is that they are not in the building where we work. I think that is a lousy way to run a newspaper—or a country.

My own paper, like many others, has urged and will continue to urge the enactment, at both Federal and State levels, of broad remedial legislation to protect all citizens. But if Congress decides to enact a narrower bill, most editors are willing to accept legislation giving the press special protection.

If that is the direction Congress chooses to take, we believe the formulation worked out by the chairman of this subcommittee and embodied in S. 1790 is appropriate. It does have the considerable merit of dealing with the product, rather than the producers—and it protects the publications and the working notes of the "lonely pamphleteer" as well as the great metropolitan newspaper or the national network.

Now we have five or six specific language suggestions that are in my prepared statement that we think are needed in S. 1790.

Let me just summarize them. In most cases they represent a tightening of the criteria, a raising of the threshold.

Where there is a national security clause we think we should add the words "which would constitute a direct, immediate, and irreparable injury to the national security." We would pick up the language of Mr. Justice Stewart in the Pentagon Papers case, to make clear a set of standards.

We have questions about the inclusion of "restricted data." That is the atomic energy section. We have doubts about the constitutionality of some of that language and it is too broad.

We have a particular point to make on the probable cause question. I notice the witnesses from the FBI and the Assistant Attorney General and others spoke repeatedly of probable cause. Well, there are 10 places in the bill where it says "there is reason to believe" and we think it ought to say "there is probable cause." Because probable cause has been interpreted. It seems to provide a definitive legal guideline. Prosecutors and judges seem to understand what it means. We don't know what "there is reason to believe" means. We think the more specific standard is involved.

We would like to make a couple of other language changes which are listed specifically in our statement.

We think there is a situation in here where there is a possibility of a back-door opportunity for search warrants being allowed by using the language "there is reason to believe" that delay and investigation occasioned by further proceedings relating to the subpena would threaten the interests of justice. We think that is a loose and easily met test; much too loose and too easily met, in our opinion.

We think the bill needs an exclusionary rule.

You may think, Mr. Chairman, that we deal in nothing but worst-case-suppositions. Well, we do. Sooner or later most authorities, including sometimes the courts, will create a worst-case situation. When that happens, only the most carefully drawn protections will help.

We do not deal in academic hypotheses in these matters. I could name a long list of prosecutors and judges and policemen who would be only too glad to disrupt the operations of our newspaper to settle some old scores and this provides them with a way to do it.

Senator MATHIAS. And the suggestion has now been made. The precedent is established.

Mr. BAILEY. Yes.

Senator MATHIAS. Which is something that—really is the difference in the climate in which we are meeting here today. For 200 years the law was at the very least it was uncertain. Now, the opportunity seems to be there. The power of suggestion is a very great power.

Mr. BAILEY. A very strong power. Protection of the printer and his papers and his printing press against surprise search and seizure was one of the root causes of the eventual adoption of the first amendment; judges on both sides of *Stanford* have stated that the fourth amendment arose primarily out of conflicts between the Crown and printers.

There is a wonderful case, *Entick* v. *Carrington and Three Other King's Men*, in England, in 1765. It says that: "Papers are the owner's goods and chattels; they are his dearest property, and they are so far from enduring a seizure, that they will hardly bear an inspection."

I just have one personal note. My ancestors on my father's side came to the Plymouth Colony from England 350 years ago. My mother's father, by contrast, came here only about 80 years ago, fleeing the persecutions that were routinely inflicted on Jews in eastern Europe. But despite the time difference, in both cases those men came to this country for reasons to live and speak freely.

We are all, as Franklin Roosevelt once remarked, "fellow immigrants." I think we would do well to remember why our forebears became immigrants, and to preserve as best we can the freedom that drew them to this country.

We believe that enactment of legislation to offset this misguided and mischievous ruling will help preserve that freedom.

Thank you.

Senator MATHIAS. Thank you, Mr. Bailey.

Mr. WATTS. On behalf of the American Newspaper Publishers Association, I thank you for this opportunity to testify on S. 1790 and other bills before the committee which are designed to return to the people of this Nation the privacy protections that were taken from them by the Supreme Court in the *Stanford Daily* decision.

We believe that S. 1790 is a worthy approach to the problem and we offer some general and specific analysis of the bill in a written statement that we would like to have made a part of the record on this hearing.

I would also like to say that we agree in full with our colleague, Mr. Bailey, from ASNE. I will try not to repeat some of the points he made.

ANPA believes that the constitutional distinction between the free press and the Government must remain intact. To allow police to obtain an ex-parte warrant, and then use it as an admission ticket

to browse through the investigative files of a free press, would be a development not remotely compatible with a strong, free society.

However, although the problem of third party documentary searches is particularly acute when it intrudes upon first amendment guarantees, the rule of that decision in the *Stanford Daily* case struck most of the free press then and continues to strike us today as an outrageous and erroneous decision which hurts every American citizen.

ANPA believes that legislation in response to this decision should not be press only in orientation. The rights and liberties of the press that we exercise daily in this area, are the rights and liberties of every citizen.

S. 1790 provides a no search rule for the work products of those involved in protected free press activities. But ANPA notes that S. 1790, as reported by the Subcommittee on the Constitution stops there.

We urge the committee to restore to the bill those provisions which cover at a minimum other professionals accorded the privilege of confidence in our society and preferably, to cover all nonsuspect third parties.

As Mr. Bailey noted, S. 1790 provides several exceptions under which searches and seizures might occur in a newsroom. We urge that the bill should uniformly provide a test of probable cause to believe, rather than reason to believe, for those exceptions to occur.

The lesser test of reason to believe, which appears throughout the bill, equates the mere suspicion on the part of law enforcement officers. We submit that the first amendment values at stake here are far too sensitive to be at the mercy of mere hunch and conjecture, presented to a judge in an ex-parte context.

Furher, it is important to remember that the wording of the fourth amendment specifically states that no warrants shall be issued except upon probable cause.

Finally, ANPA would like to address the scope of S. 1790. We believe that the bill rightfully recognizes that any effective remedial legislation must be applicable not only to Federal law enforcement officials, but also to officials of State and local government.

However, some of the language in the bill is confusing on this point. We urge the committee to include a definition of government official or employee which would make it clear that the bill applies both to Federal and State officials.

Ms. ATCHESON. Mr. Lewis.

Mr. LEWIS. Yes. My name is Robert Lewis. I am chairman of the Freedom of Information Committee of the Society of Professional Journalists, Sigma Delta Chi.

I would just like to make one or two observations. I will be very brief and will stand on my statement.

While there has been no proliferation of newsroom searches in the 22 months since the *Zurcher* decision was handed down, the threat of such searches has caused many news organizations to take steps to protect the identity of confidential sources.

It is impossible to estimate how many information sources have dried up and how many stories were not written because of *Zurcher*.

If you believe, as the society does, that the job of the press in a free society is to help keep those who govern accountable to those

who are governed, the *Zurcher* decision indeed has had a chilling effect on press coverage of public affairs.

We would like to reaffirm our support for a broad protection against searches of all innocent third parties. We feel it is important that this protection apply at all levels of law enforcement because at the local level is where the problem of searches is most likely to occur.

I was gratified to hear the Assistant Attorney General say in his statement, on page 18, that the Department of Justice has no argument with the policy of a broad third party protection.

In fact, he says, that policy is in effect now at the Federal level. It would appear then that the argument comes down to whether the policy that the Justice Department has already adopted for itself should be placed in the law. We believe it should.

Thank you.

Ms. ATCHESON. Mr. Landau.

Mr. LANDAU. Thank you very much. My name is Jack Landau. I am director of the Reporters Committee. I am accompanied by a colleague of mine, Sharon Mahoney who is a lawyer in our office.

We support the statements that have generally been put forward by the other speakers. So I would just like to address myself to a few of the problems, one of which Mr. Bailey touched on and that is this exception to the exception which would, under the administration proposal, permit or have permitted a search for the Pentagon papers and the Progressive.

We would not only say that it would have to be a direct, immediate, and irreparable injury to the National security, because that is what the Government alleged in its affidavits in that case anyway.

But furthermore, we would adopt the suggestion that Mr. Lewin made that in addition they would have to say that there was probable cause to believe that the information was going to be destroyed.

We can give you, given the past 6 or 7 years, a whole list of stories where the Government alleged direct, immediate and irreparable injury—the tilt toward Pakistan, the Glomar Explorer and so forth and so on.

The Government seems to find it very easy to make allegations of direct, immediate and irreparable injury to the national security.

And, since we know of no instance of a news organization which has ever destroyed any documents that were subpenaed, we think they should have to make this additional showing.

I am sorry Senator Mathias has left. I think he has put his finger on what has been one of the problems in the development of this legislation from the beginning.

Originally, the right to search came from contraband or fruits or instrumentalities of a crime. The reason was that if you broke the law of the realm of England, automatically the fruits and instrumentalities of the crime were forfeited to the Crown.

Therefore the Crown had the right to go in anyplace, suspect or nonsuspect, and seize these fruits or instrumentalities.

Subsequently, in the development of American law, I don't know about the development of British law, but subsequently, in the development of American law, we engrafted on an additional factor

which said, if it looks like they are going to destroy the evidence, then you can search.

The theory being that because 90 percent of the search warrants, at least in a recent study in New York City, are for drugs, if you were a suspect, you are going to destroy the evidence.

Now most of the examples he gave us, the contraband being carried by the innocent carrier, would be fruits or instrumentalities of a crime, or contraband, and would be searchable under any conventional reading of the fourth amendment, since 1789.

The problem is that what was at issue in *Stanford* and what bothers us all today is that we are not dealing with a person who is a suspect and therefore likely to destroy, and we are not dealing with any evidence which is intimately related to the crime as a fruit or instrumentality.

We are dealing here with a newspaper which simply stood to one side, took a picture, went back to the office, and then several hours later found police rummaging through every file.

It is that question of evidence which has caused the problem. Just to remind you, *Warden* v. *Hayden* had nothing to do with a nonsuspect. The man was accused of murder. They found the bloody shirt in the laundry machine.

So that I don't think that the majority opinion in *Zurcher* is at all honest to say that this is a logical extension of *Warden* v. *Hayden*.

In fact, Justice Fortes, in his dissent in *Warden* v. *Hayden* said, I can't remember the exact quote, but he said, "This is going to swallow up, this decision is eventually going to swallow up the fourth amendment."

So that I think it would be very wise for the subcommittee to pursue Senator Mathias' line of questioning when he questions why is it necessary to expand the exception any further than fruits and instrumentalities, contraband or suspects where there is a probable cause to believe they will destroy.

Now that is the conventional, that has been the conventional interpretation, based on the English Common Law theory of forfeit to the Crown.

The other problems we have with the bill are stated in this testimony. We would like to thank you very much for the time.

Senator MATHIAS [acting chairman, presiding]. Well, we thank you very much. We appreciate your comments.

Mr. SCHARFF. Mr. Chairman, my name is J. Laurent Scharff, a member of the law firm of Pierson, Ball & Dowd in Washington. I am here as counsel for the Radio Television News Directors Association.

I would like to submit my statement for the record and state my support for all of the points that have been made by those on the panel thus far. I will skip through most of my testimony because of that, but I would like to emphasize a couple of points that I made and the others have made to some extent also.

In sections 101 (a)(1) and (b)(1) of the bill, the allowance of searches for national defense information, classified information or certain other restricted data disturbs us.

Many of the listed statutes permit documents to be classified indiscriminately, and national security agencies can hamper publication of

embarrassing information by classifying it. Under these exceptions, for example, no doubt the Pentagon papers would have been subject to seizure.

Any agency requesting such a search should be required to demonstrate to an impartial magistrate that the publication or other use of the specific documents in question would pose a clear and present danger to the security of the United States.

We emphasize that all we are talking about here is a "subpena first" rule, to avoid the effect of a prior restraint by Government search and seizure.

We are not dealing with the substantive question of under what circumstances, after adversary proceedings, a court would permit a subpena duces tecum to issue.

We are not dealing with the substantive question of under what circumstances a person may be convicted of possessing certain kinds of Government information.

With respect to paragraph 4 in each of the three titles of the bill, each of those paragraphs deals identically with searches during appellate litigation in resistance to a subpena duces tecum. We object to the provision permitting a search warrant to issue if there is reason to believe that further proceedings under the subpena would "threaten the interests of justice." Since any delay in the judicial proceeding may in some sense be threatening to the interests of justice, this provision is far too broad.

Instead, the bill should be amended to state that a search warrant may be issued in the described circumstances only if the court makes a specific finding that the severity and immediacy of the need for the documents sought, as well as the societal importance of the Government's case, outweigh the first amendment and due process interests in allowing full judicial review of the defenses to the subpena.

Now that is a mouthful but we have sought to articulate the interests that should be balanced, and if some other wording can be found we are not wedded to this wording. But we think those are the interests that should be balanced before litigation is terminated over a subpena in the "interest of justice."

I would also like to emphasize what Mr. Lewin said in his testimony. I think all of the examples given by Mr. Heymann and Mr. Revell are covered by the exceptions in S. 1790, at least the exception for destruction of documents if not the exception when a person is actually a suspect in the crime, such as the sister of the mob member or the lawyer in cahoots with his client. And the courier carrying the briefcase is certainly no innocent third party.

Thank you, Senator.

Senator MATHIAS. The distinguished Senator from Wyoming, Mr. Simpson, a member of this committee, who is not able to be here this morning has asked me to propound this question.

Do you agree with the drafters of title I, that a newspaper should be protected even if it has announced that it would destroy the materials if they are subpenaed? He would like to know, if you do agree with that, why you agree with it.

Mr. BAILEY. I will take a crack at that. It is discouraging to hear people say that the constitutional protections of the Bill of Rights

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should apply only to people who say nice things to law enforcement officers.

We try to be civil in our contact with Government authorities in our day-to-day operations of our newspaper. I certainly have no brief for students who say, "If you come after our negatives, we will burn them up," or whatever it is alleged the editors of the Stanford Daily may have said. But I don't think that is a basis for legislation.

Senator MATHIAS. Is there any further response to Senator Simpson's question?

Mr. LANDAU. Senator, I think we know of more than 800 subpenas that have been issued to the press since 1970. I know of no case where it has ever been alleged that any newspaper or journalist has ever destroyed the information once the subpena has arrived, regardless of the statements made by some of the editors of the Stanford Daily. After all, a subpena is served without notice. It arrives at the door and from the moment it arrives you are then under a legal obligation not to destroy the information.

I think it is somewhat disturbing that some member of this committee would think that other institutions which receive subpenas will obey the law, but that there is a possibility the press will not, when in fact we have been subpenaed frequently over the past 10 years. I know of no situation where it has ever been alleged that a newspaper has not obeyed the law and preserved the documents, to the point of reporters going to jail for 40 and 50 days, when I suppose it would have been more convenient to simply destroy it and say, "We don't have it."

Mr. BAILEY. If destruction did occur, I think they could prosecute him for such destruction of material under a subpena.

So, had the editors of the Stanford Daily burnt their negatives, I assume they could be prosecuted.

Senator MATHIAS. Unfortunately, at our back we always hear Time's winged chariot hovering near. We can pursue this at great length. I think perhaps we have gone as far as we need to go at this moment.

We are very grateful for your interest, and I think particularly for the view that was expressed on behalf of the panel by Mr. Bailey. You don't speak only for first amendment rights, but for a broader area of privacy in which every citizen has a stake.

Thank you very much.

[The prepared statements of Messrs. Bailey, Watts, Lewis, and Scharff follow:]

PREPARED STATEMENT OF CHARLES W. BAILEY

My name is Charles W. Bailey, Editor of the Minneapolis Tribune, and I appear here today on behalf of the American Society of Newspaper Editors and its Freedom of Information Committee, of which I am the chairman. The Society's members include more than 800 supervising editors of daily newspapers throughout the country.

Officers of the ASNE are William Hornby of the Denver Post, president; Thomas Winship of the Boston Globe, vice-president: Robert Clark of the Florida Times-Union, secretary; and Michael O'Neill of the New York News, treasurer.

As the Committee is no doubt aware, newspaper editors all over the country were alarmed by the decision of the Supreme Court in the *Stanford Daily* case. ASNE testified in 1978 in the Senate and in 1979 in the House in support of remedial legislation, and I have been instructed by the Society's board of directors to reaffirm that position here today.

We believe that the *Stanford Daily* decision represents a very serious threat to the right of citizens generally to be secure from unannounced police searches.

and a serious threat to the operation of a free press. In using the term "free press" I mean to include all forms of publishing—books, magazinees, broadcasts, photographs, films and other forms of public communication—as well as the traditional newspaper.

The Supreme Court made it explicitly clear that legislative remedies are available, and proposed legislation has in general taken one of two forms—either what might be called a "fourth amendment" approach, dealing with all warrant searches of innocent third parties, or a "first amendment" approach, focused solely on publications.

Our reservations about a press-only approach stem from two beliefs: First, we believe the American press should in general try not to ask for special legislation—many of us believe that a proper interpretation of the First Amendment gives us all the protection we need. Second, we believe that the rights of others in our society—for example, doctors and lawyers—are as much infringed by this decision as are the rights of the press.

Therefore, most of us would prefer broad legislation to protect not only the press but all other citizens. We base this preference on consideration such as those cited by Mr. Justice Stevens in his *Stanford* dissent:

> Countless law-abiding citizens—doctors, lawyers, merchants, customers, bystanders—may have documents in their possession that relate to the ongoing criminal investigation. The consequences of subjecting this large category of persons to unannounced police searches are extremely serious. The ex parte warrant procedure enables the prosecutor to obtain access to privileged documents that could not be examined if advance notice gave the custodian an opportunity to object.

We regret that the Administration has not supported broad legislation for the protection of all citizens. We agree with the position taken in the *Stanford* case by the district and circuit courts, and by Mr. Justice Stevens in his dissent; we think it would leave federal and state officials with adequate tools to enforce the laws.

But the *Stanford* decision does have a special and immediate effect on the press. Mr. Justice Stewart noted the "burden" involved in the possibility that police rummaging through newsrooms would find information received from confidential sources—and might be able to identify, and disclose, the sources themselves.

Every editor I know is deeply skeptical—to put it mildly—about Mr. Justice White's statement, in the majority opinion in *Stanford*, that magistrates will be careful in considering search-warrant requests affecting the press. Anyone who has ever covered police court knows that in a great many cases search warrants are issued as a matter of course, with very little inquiry; and in some jurisdictions, of course, they may be issued by magistrates who are not even lawyers.

The Minneapolis Tribune, like many other newspapers, has taken steps to protect its confidential files, and those of its staff members, from the kind of surprise sweep-and-rummage search legitimized by the court in *Stanford*. It is one of the minor ironies of the climate that now exists in American newsrooms that it seems prudent for me not to know where the confidential notes and working papers of my reporters are kept. All I know is that they are not in the building where we work. I think that is a lousy way to have to run a newspaper—or a country.

My own newspaper, like many others, has urged and will continue to urge the enactment, at both federal and state levels, of broad remedial legislation to protect all citizens. But if Congress and the legislatures are unwilling to enact such legislation, virtually all editors are willing to accept legislation giving the press special protection against search warrants. If that is the direction the Congress chooses to take, we believe the formulation worked out by the Administration is an appropriate one. It has the considerable merit of dealing with the product, rather than the producers—thus simplifying the problem of defining who is protected by the First Amendment. It protects the publications, and the working notes, of the "lonely pamphleteer" as well as the great metropolitan newspaper or the nationwide broadcasting network.

Addressing that proposal, as spelled out in S. 1790, we would like to suggest some modifications in present language:

1. On page 2, line 21, after the word "data" and on page 4, line 3, after the word "data" add the following: "which would constitute a direct immediate and irreparable injury to the national security."

We believe it would be wise to include this wording, which picks up the prior-restraint test specified by Mr. Justice Stewart in the Pentagon Papers case. We strongly believe that to leave the wording of the bill as it is now would con-

travene the court's restriction of the prior-restraint power of the federal government.

2. On those same lines, incidentally, we would raise a question about the use of "restricted data." We do so because ASNE and its counsel have serious doubt as to the constitutionality of the section of the Atomic Energy Act that establishes the "restricted data" classification. We raised this issue in the brief we filed amicus curiae in the *Progessive Magazine* case.

It is our contention that those sections of 42 U.S.C. cited are over-broad and vague. For example, when these sections discuss the communication transmission or disclosure of "restricted data", we must look to their definition of "restricted data" as defined in 42 U.S.C. 2041(y), where it is stated:

> The term "Restricted Data" means all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to Section 2162 of this title.

Under current government interpretation it appears to me that any information whatever about atomic weapons or special nuclear material, whatever its origin, is classified—and that its disclosure provides the basis for criminal sanctions unless and until the government sanctions it. The crime described is not limited to information about nuclear weapons but even a journalist's idle musings about the nature or use of nuclear weapons or the operation and development of nuclear power facilities could well constitute a crime under the government's current interpretations. Could stories about Three Mile Island or the studies of victims at Hiroshima bring about a search? It is for these reasons that we think it imperative that the language "which would constitute a direct immediate and irreparable injury to the national security" be included.

3. On page 3, line 1; page 4, line 7; page 4, line 10; page 4, line 19; page 5, line 22; page 6, line 6; page 7, line 3; page 7, line 6; page 7, line 15; eliminate "there is reason to believe" and substitute "there is probable cause to believe".

We note that on page 2, line 8; page 3, line 15; page 5, line 15; page 6, line 6; the Act as drafted uses a "probable cause" test. "Probable cause" has been interpreted by the courts and seems to provide a definitive legal guideline, but we do not know what is meant by "there is reason to believe", and it appears to us that the Act should be consistent by utilizing "probable cause".

4. On page 4, line 17; page 6, line 6; page 7, line 13; eliminate the word "appellate" and substitute the word "judicial".

It is conceivable to us that a person could well have exhausted all of his "appellate" remedies at the state level but still have a legal premise to move into the federal court system. This would not in the strictest sense of the word constitute an "appellate" proceeding, but could be in effect a de novo action. Therefore, we feel it is better to utilize the word "judicial" rather than "appellate".

5. On page 4, eliminate lines 19 through 25, and on page 5 eliminate lines 1 and 2; page 6, lines 6 through 14; page 7, lines 15 through 23.

The language contained in these Sections appears to open a back-door opportunity to obtain a search warrant. To state, "there is reason to believe that the delay in an investigation or trial occasioned by further proceedings relating to the subpoena would threaten the interests of justice" is a loose and easily met test: much too loose and too easily met, in our opinion.

6. On page 8, eliminate the entire sentence beginning with the word "It" on line 24, through page 9, line 2.

This seems to us an open invitation for anyone to escape liability; what officer or employee would contend that he had anything other than a "reasonable good faith believe in the lawfulness of his conduct"?

7. We believe an exclusionary rule should be included in this legislation. I am a good deal less optimistic than the Justice Department seems to be in predicting that violations of the proposed statute "will be, in nearly all cases, inadvertent and unintentional."

If the Committee will indulge me, I would add a couple of closing thoughts.

First, it may seem that we deal in nothing but worst-case suppositions. Well, indeed we do, and for good reason: over time, most journalists learn that sooner or later the authorities, including sometimes the courts, will create a worst-case situation. And when that happens, only the most carefully-drawn protections will help.

We do not deal in academic hypotheses in these matters. I could name at least two judges, two prosecutors, and a dozen sheriffs and police officials who could be delighted to embarrass or otherwise disrupt the operations of our newspaper because of things we have published about them in the past—things we published not for the fun of it but as part of our responsibility to a self-governing community.

Finally, we are dealing here with matters which go to the heart of our system of government and which have been in contention since the earliest efforts to free our self-governance from the weight of tyranny. Protection of the printer, his papers and his press against surprise search and seizure was one of the root causes of the eventual adoption of the First Amendment; judges on both sides of *Stanford* have stated that the Fourth Amendment arose primarily out of conflicts between the Crown and printers.

The case law reaches back to 1765 and to the opinion of the Lord Chief Justice of England in a case titled *Entick* v. *Carrington and Three Other King's Men.* Lord Camden, ruling for printer John Entick and against the royal search warrant, said:

> Papers are the owner's goods and chattels; they are his dearest property, and they are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of trespass, and demand more considerable damages in that respect.

If you will permit a personal note in closing: My ancestors on my father's side came to the Plymouth Colony from England three hundred and fifty years ago. My mother's father, by contrast, came here only about eighty years ago, fleeing the oppressions routinely inflicted on the Jews of eastern Europe. But despite the time difference, in both cases those men came to this country so they could live and speak freely.

We are all, as Franklin Roosevelt once remarked, "fellow immigrants." Let us remember why our forebears became immigrants, and let us preserve as best we can the freedom that drew them to this country. The enactment of legislation to offset this misguided and mischievous ruling will help preserve that freedom.

PREPARED STATEMENT OF DOUGLAS R. WATTS[1]

Mr. Chairman: I am Douglas R. Watts, Staff Counsel of the American Newspaper Publishers Association.

ANPA is a trade association whose 1372 member newspapers comprise more than 90% of the daily and Sunday newspaper circulation in the United States. Many non-daily newspapers also are members.

On behalf of ANPA, I thank the chairman and members of the committee for this opportunity to testify on S. 1790 and other bills before the committee designed to remedy the Supreme Court's split decision in *Zurcher* v. *The Stanford Daily.*

Mr. Chairman, protection against the unannounced, law-officer search of a newsroom is essential to the maintenance of our free press. To render the files and documents of a newspaper vulnerable to the type of "quick-warrant-and-ransack" search authorized by the *Stanford Daily* decision is to make a dangerous move toward the annexation of the press as an investigative arm of the government. The price of this move is paid in freedom.

ANPA recognizes the hard work performed by this committee and by the subcommittee on the Constitution in their efforts to legislatively return to the people of this nation the privacy protections taken from them by the Supreme Court in the *Stanford Daily* decision. We believe S. 1790, which is now before this committee, is a worthy approach to the problem, and we will offer some general and specific comments on that bill.

The problem with the newsroom search is a very simple one: we believe it is constitutionally different, and must be distinguished, from the more usual types of searches for "hard evidence."

In a newsroom, the expected object of a search and seizure is not the instrumentality or fruit of any crime, but merely information. In order to carry out such a search, officials must examine irrelevant documents in order to find the

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[1] This testimony is endorsed by the National Newspaper Association representing more than 5,500 weekly and daily community newspapers throughout the United States.

ones, if any, which are subject to seizure. It is entirely likely that—while officers are rummaging through many documents to locate those sought—sensitive information and confidential sources will be exposed which have no bearing at all on the specific investigative intent of the searches.

We agree completely with Mr. Justice Stewart's unequivocal statement in his dissent in *Stanford Daily*: "Protection of these sources is necessary to ensure that the press can fulfill its constitutionally designated function of informing the public."

And we further agree with his position that it is "self-evident that police searches of newspaper offices burden the freedom of the press."

If reporters and the publishers for whom they work are to operate free of government coercion, then police must not be allowed to waltz in the newsroom door to see what has last been entered in a file of "Local Political Corruption, Pending" or "Police Misconduct, Pending" or even "Criminal Trials—Miscellaneous Notes."

ANPA believes that the constitutional distinction between the free press and the government must remain entact. To play their proper roles under our Constitution, the two must operate separate from one another. To allow police to obtain an ex-parte warrant, then use it as an admission ticket to browse through the investigative files of the free press, would be a development not remotely compatible with a strong, free society.

Every day, newspapers are involved in gathering information and in reporting to the people about the operation of government—including the police, the prosecutors and the courts. Much of this information comes from confidential sources—people who would not publicly provide this information about alleged abuses or outright criminality if they knew the police could identify them by using the newspaper's own files.

This flow of information—vital if the press is to fulfill its watchdog function for the public—could slow to a trickle or dry entirely if newspapers can no longer guarantee confidentiality.

Similarly, the investigatory spirit of a newspaper may be sapped in some instances. It would be regrettable, but understandable, for a reporter to be reluctant to pursue leads if he knew that perhaps the subject of his story, or the subject's friends, could obtain a warrant and uncover all of the reporter's information and sources. It is perhaps not unfair to note that confidential sources can range from deputies to District Attorneys—even senators and presidents; and search sites under the court's ruling might even be the homes of members of Congress, not just newsrooms.

And, ANPA notes that the careful structuring of search warrants is far from an exact science. In many cases, the magistrates issuing the warrants would be laymen. Due consideration of First and Fourth Amendment protections easily could get lost in the ex-parte procedure between a magistrate and the law enforcement officials with whom he regularly deals.

Of course, even a warrant which meets the strictest requirements as to specificity is no guarantee against the occasional overzealous searcher using the opportunity of a newsroom search to rifle and rummage and intimidate and obstruct indiscriminately.

An unannounced police raid on a newsroom at edition deadline time might well be so disruptive as to imperil publication itself, producing de facto the very "prior restraint" the Supreme Court has normally ruled impermissible.

The fact that these dire possibilities have not been realized in the time since the court's decision is of no solace. It is largely due to the quick and proper response of then Attorney General Bell, several state attorneys general, and some state legislatures around the country that promptly issued guidelines and rules which reined in the police power to search the press. ANPA and the newspaper business appreciate these responsible actions, but we believe they are but short-term solutions. These remedies exist—for the most part—at the discretion of those who hold office. Lasting protection from the daily threat posed by the court's decision can come only from statute.

Mr. Chairman, ANPA's concerns in this area are in part based on what we have seen in other countries. ANPA, through a variety of active affiliations with international press organizations, plays an integral role in world press freedom matters. This experience makes us all the more appreciative of our free society with its independent press. The record is clear that in those countries where the press has been fettered by government, where it has been used as part of

a government's investigatory apparatus, where it functions at the whim of government police—in those countries neither the press nor the people are free.

Mr. Chairman, although the problem of third-party, documentary searches is particularly acute when it intrudes on First Amendment guarantees, the "rule-of-rummage" decision in the *Stanford Daily* case struck most of the free press then, and still strikes us today, as an outrageous and erroneous decision which hurts every American citizen.

ANPA believes legislation in response to the decision should not be "press-only" in orientation; the rights and liberties which the press exercises in this area are the rights and liberties of every individual citizen.

Let me turn now in detail to S. 1790.

ANPA recognizes that Justice Department officials and representatives of this committee have labored long and hard to develop a workable piece of legislation which would protect the free press from unnecessary and unreasonable third-party searches.

S. 1790 provides a no-search rule for the work-products of those involved in protected free-press activities. And, it greatly restricts the power to search for and to seize all other documents and information in the possession of those engaged in such activities. The bill properly applies only to third-party, non-suspect searches; protection is not extended to instrumentalities or fruits of crime.

Our first observation, however, remains our concern that the legislation, as reported by the subcommittee on the Constitution, stops there. We urge the committee to return to the bill the provisions which cover, at a minimum, other professionals accorded a privilege of confidence in our society—and, preferably, to cover all non-suspect third parties.

ANPA agrees with Mr. Justice Stevens, who wrote in *Stanford Daily*, "Countless law-abiding citizens—doctors, lawyers, merchants, customers, bystanders—may have documents in their possession that relate to ongoing criminal investigations. . . . The only conceivable justification for an unannounced search of an innocent citizen is the fear that, if notice were given, he would conceal or destroy the object of the search." Without probable cause to support that fear, the invasion of the privacy of an innocent citizen's home or workplace simply cannot justify the law enforcement interest it is intended to vindicate.

Mr. Chairman, ANPA generally supports the approach of S. 1790 which would prohibit third-party searches for documentary materials and which seems to require, instead, production of such material by subpoenas.

However, the bill provides several exceptions under which searches and seizures might occur. ANPA does not disagree with the conditions set forth in most of these exceptions, but we urge that the bill uniformly provide a test of "probable cause to believe" that those conditions exist. The lesser test of "reason to believe," which appears in various places throughout the bill, equates to mere suspicion on the part of the law enforcement officers. The First Amendment values at stake here are far too sensitive to be at the mercy of mere hunch and conjecture, presented to a judge or magistrate in an ex-parte context. Further, it is important to remember that the Fourth Amendment guarantees that ". . . no Warrants shall issue, but upon probable cause . . ."

One of the exceptions to the prohibition against searches for work products, and to the limitation on searches for other documents, would allow police to rummage through documents in order to find information relating to national defense, information that is classified, or data that is restricted under the espionage laws and related statutes. ANPA believes this exception is overboard. It allows for government seizure of documents without a determination of their sensitivity to national security and without an assessment of whether they legitimately deserve to be classified. Under this approach, a "secret" stamp on the desk of a bureaucrat becomes the instrument of authorization for a newsroom search.

Therefore, ANPA urges the subcommittee to adopt the standard articulated by the Supreme Court in the Pentagon Papers case. Sections 101(a)(1) and 101(b)(1) should be amended to allow searches only for restricted information which, if disclosed, would cause "a direct, immediate and irreparable injury" to the national security.

Section 101(b)(4)(A) would allow a search and seizure if there existed a court order for compliance with a subpoena and if appellate remedies for the subpoena had been exhausted. ANPA recognizes the legitimate aim of this excep-

tion—to preserve the authority of the court and its power to compel proper production of information. But ANPA is concerned that this section could be read to defeat due process rights of reporters and others engaged in First Amendment activities.

It is reasonable to suppose that a newspaper, faced with a subpoena from a state court, might file a motion to quash. It is equally reasonable to suppose that judicial action on this motion might be litigated through the state's appellate process. Upon exhaustion of appellate review, a court could issue an order directing compliance with the subpoena. Yet, the newspaper may still be faced with important constitutional and collateral questions concerning the subpoena which were excluded from the appellate actions by the state's procedural rules but which could be raised in federal court. Often, determinations of these issues may be paramount to a newspaper's response to a subpoena.

In order to preserve full due process rights, and in order to prevent abuse of this exception to the no-search protections of S. 1790, ANPA urges the subcommittee to replace the word "appellate" with the word "judicial."

ANPA further is concerned that the exception contained in Section 101(b)(4)(B) is so broad and ambiguous that it may undermine the protections S. 1790 is designed to afford.

This exception allows for a search when materials have not been produced in response to a court order directing compliance with a subpoena, and where there is reason to believe that the delay in an investigation or trial occasioned by further proceedings relating to the subpoena would threaten the interests of justice.

It would be easy to read this section as an authorization for a search immediately upon the denial of a motion to quash the subpoena. Thus, this section could effectively preclude appellate review of a trial court's denial of a motion to quash, eviscerating the due-process rights of the press. ANPA urges the subcommittee to delete entirely this provision of the bill.

ANPA also takes issue with the complete defense to civil remedies provided in Section 402(a)(2). This defense allows complete vitiation of liability for any law-enforcement official who has conducted a newsroom search with "a reasonable, good-faith belief in the lawfulness" of the search.

It is essential to keep in mind that the damage done by a newsroom search is an irretrievable intrusion upon the exercise of First Amendment freedoms. It is simply unacceptable to render these freedoms subject to some hoped-for "reasonable good faith" of the police. It is a hazard which a free press and a free people dare not risk. It is simply the Russian way, not the American way.

ANPA urges the subcommittee to delete this defense. By striking the defense and thereby buttressing civil liability, the subcommittee would properly encourage law-enforcement agencies to conduct more-thorough investigations before a warrant is secured—a result that would benefit everyone.

Finally, ANPA would like to address the scope of S. 1790. The bill rightfully recognizes that any effective remedial legislation must be applicable not only to federal, law-enforcement officials, but also to officials of state and local government. However, ANPA believes that Congress should do nothing to subvert the efforts made in state legislatures across the country to remedy this intolerable decision. Eight states already have enactel laws on this subject, and bills currently are pending in many other state legislatures. Congress should not diminish the safeguards adopted in any state.

Mr. Chairman, I thank you and the members of the committee for this opportunity to present ANPA's views. We are confident that the committee will duly consider the legitimate concerns of the free press which is indispensable to our free society.

We respectfully request that this statement be made part of the record of hearings on S. 1790.

STATEMENT OF THE SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI. DELIVERED BY ROBERT LEWIS, CHAIRMAN, FREEDOM OF INFORMATION COMMITTEE

Thank you, Mr. Chairman, for this opportunity to discuss the Privacy Protection Act of 1979, S. 1790, and related legislation. My name is Robert Lewis. I am a Washington correspondent of Newhouse Newspapers and chairman of

the Freedom of Information Committee of the Society of Professional Journalists, Sigma Delta Chi. The Society, as you may know, is the world's largest and most representative organization of journalists. Founded in 1909, we have 300 chapters and 35,000 members in every branch of communications. Our membership includes print and broadcast journalists as well as journalism students and teachers.

The basic decisions confronting this committee as it considers whether to address the problems raised by *Zurcher* v. *Stanford Daily* are these:

Should restrictions on police searches of persons not suspected of criminal wrongdoing apply to the press only; to the press, lawyers, clergymen and medical doctors, or to all innocent third parties?

Should restrictions on police searches of innocent third parties apply to federal, state and local law enforcement agencies, or to federal authorities only?

The Society believes that all innocent third parties should be secure from unannounced police searches and seizures, and that this rule should apply to all law enforcement agencies—federal, state and local.

We believe that the proper way to obtain evidence in a criminal investigation is through a subpoena which specifies the articles to be sought and which can be contested in court.

The search warrant is particularly destructive when applied to the press, because rather than searching for the fruits of a crime, police would be looking for information. And the information in newsrooms that would be of greatest interest to police would not be material derived from the public record but information given to a journalist in confidence.

The whistle-blowers of this country and others who do not want to go through channels to report wrong-doing frequently take their case to the press. It takes no great imagination to conceive of situations where a judge, a prosecutor, a chief of police would use the powers granted in *Zurcher* v. *Stanford Daily* to try to head off embarrassing—or worse—disclosures.

While there has been no proliferation of newsroom searches in the 22 months since the Zurcher decision came down, the threat of such searches caused many news organizations to take steps to protect the identity of confidential sources. It is ismpossible to estimate how many information sources dried up, how many stories were not written because of Zurcher. If you believe, as the society does, that the job of the press in a free society is to help keep those who govern accountable to those who are governed, the Zurcher decision indeed has had a chilling effect on press coverage of public affairs.

Beyond that, the Society believes that all persons not suspected of criminal wrongdoing should be safeguarded from surprise police searches. If not under the Fourth Amendment, then by legislation passed by Congress.

Search and seizure of the possessions of persons not suspected of wrongdoing is alien to America's concept of freedom and justice. It is a tool of the police state, not of the free state. For nearly 200 years, law enforcement agencies have gotten along without this power. It is hard to understand why police now feel threatened by legislation to eliminate a power they had rarely, if ever, exercised.

The potential for abusive searches of newsrooms is greatest at the local level. Local magistrates are apt to give priority to any number of factors other than First and Fourth Amendment rights in issuing search warrants. Further, local officials feel the sting of a crusading newspaper of broadcaster more directly than their state or federal counterparts, and the temptation to retaliate may be greater.

I would suggest the following changes in S. 1790. In Section 101(a)(1) and 101(b)(1) searches are authorized for material even remotely related to national defense. We believe that only material whose disclosure would directly and irreparably harm the national security should be subject to warrantless searches.

Searches are authorized in some parts of the bill under a "probable cause" test and in other parts under a "reason to believe" test. We urge that probable cause be the uniform test throughout the bill.

The bill authorizes civil damages for illegal searches of newsrooms but then virtually nullifies this remedy by providing as a defense an officer's "reasonable good faith in the lawfulness of his conduct (Section 402(a)(2). We would urge that this language be deleted. Thank you, Mr. Chairman.

PREPARED STATEMENT OF J. LAURENT SCHARFF

Mr. Chairman and Members of the Committee: My name is J. Laurent Scharff, a member of the law firm of Pierson, Ball & Dowd, Washington, D.C. I am here as counsel for the Radio Television News Directors Association, an organization of approximately 1,600 news directors and other editorial personnel at broadcast stations across the country and at the networks. RTNDA participated in the *Stanford Daily* case and has actively supported the efforts to provide statutory protection from the kind of search permitted in that case by the Supreme Court.

We appreciate this opportunity to comment upon Senator Bayh's bill, the Privacy Protection Act of 1979, S. 1790, and additional proposals to protect the press and other innocent third parties from investigative abuses.

In previous congressional testimony, RTNDA has supported legislation to protect all non-suspects, not just journalists, from routine searches. We believe that third-party searches invade the privacy which the Fourth Amendment guarantees to all. Legislation should protect not only the press but all citizens—certainly professionals such as doctors, lawyers, and ministers, whose confidences are protected against disclosure by the laws of almost every state.

Thus, RTNDA supports Titles II and III, as well as Title I, of S. 1790, but with some important qualifications to the entire bill.

We approve the broad protection for journalists' work product, which government can have little or no legitimate interest in obtaining. Both with work product and other documentary material, however, we are concerned about the breadth of the exceptions to the general ban on searches.

First, in the present form of sections 101(a)(1) and(b)(1), the allowance of searches for national defense information, classified information or certain other restricted data disturbs us. Many of the listed statutes permit documents to be classified indiscriminately, and national security agencies can hamper publication of embarrassing information by classifying it. Under these exceptions, for example, no doubt the Pentagon Papers would have been subject to seizure.

Any agency requesting such a search should be required to demonstrate to an impartial magistrate that the publication or other use of the specific documents in question would pose a clear and present danger to the security of the United States. We emphasize that all we are talking about here is a "subpoena-first" rule, to avoid the effect of a prior restraint by government; we are not dealing with the substantive question of under what circumstances, after adversary proceedings, a court would permit a subpoena duces tecum to issue; and we are not dealing with the substantive question of under what circumstances a person may be convicted for possessing certain kinds of government documents.

With respect to other provisions, RTNDA does not question the idea of a search when it is truly necessary to prevent death or serious bodily injury to a human being, or to prevent destruction or alteration of required materials. S. 1790, however, would permit a search if there is only "a reason to believe" one of these events would occur. That standard is too permissive, as it would allow searches on the basis of mere suspicion. Instead, "probable cause" should be the standard for determining the need for a search. With that well-accepted standard, the interests in protecting human life and assuring the availability of records necessary for prosecution could be protected, while requiring the government to have information of probative value showing the danger of delay.

Finally, RTNDA is concerned about the paragraph numbered (4) in the first three titles of the bill. Each paragraph (4) deals identically with searches during appellate litigation in resistance to a subpoena duces tecum. We object to the provision permitting a search warrant to issue if there is reason to believe that further proceedings under the subpoena would "threaten the interests of justice." Since any delay in a judicial proceeding may, in some sense, be threatening to the interests of justice, this provision is far too broad. Instead, the bill should be amended to state that a search warrant may be issued in the described circumstances only if the court makes a specific finding that the severity and immediacy of the need for the documents sought, as well as the societal importance of the government's case, outweigh the First Amendment and due process interest in allowing full judicial review of the defenses to the subpoena.

With these changes, we believe that S. 1790 would provide the protection necessary in this area for the operation of a free press and a secure citizenry.

Senator MATHIAS. Our next witness will be Stephen Kanter, professor, Lewis and Clark University School of Law, Portland, Oreg.

TESTIMONY OF STEPHEN KANTER, PROFESSOR, LEWIS AND CLARK LAW SCHOOL, PORTLAND, OREG., PRESIDENT, OREGON AMERICAN CIVIL LIBERTIES UNION

Mr. KANTER. Mr. Chairman, unlike Mr. Heymann, I won't ask for quid pro quo for not reading my prepared statement this morning. I would rather rely on logic and policy to convince you of the correctness of my position.

There are those who might criticize the slow pace of legislative activity and the postponement of these hearings that caused me, instead of having a trip over spring vacation, to have to cancel a class. But I can assure you that my 100 students greeted the news with great joy.

I would just like to comment on a couple of things that Mr. Heymann and Mr. Revell said during their testimony. They are not here to respond, of course.

To begin with, Mr. Revell gave us some fairly substantial detail about the great safeguards that exist when an agent of the Federal Bureau of Investigation obtains a search warrant. One would have to take some measure of comfort from that and assume that there would not be improper or illegal searches.

Unfortunately, history suggests that events are quite different. The reporters are full of cases where the Federal Government has been involved in searches that were later declared to be unconstitutional, even by the current judiciary which has decided the *Zurcher* case.

So I think the record is just not there. In my prepared statement, I have devoted one of the footnotes to several of the examples of situations where judges and magistrates are not as careful as they need to be in issuing search warrants.

Second, Mr. Revell worried about titles I, II, and III of this bill. He said that it would create—I am paraphrasing here—a novel, new category of separating out documentary evidence. What is actually novel, of course, is that the U.S. Supreme Court abolished this long-standing distinction in the 1970's, in *Zurcher*, *Andresen* v. *Maryland*, *Couch* and several other cases.

Senator MATHIAS. Of course, there is a certain amount of novelty in view of the fact that title I really is Government language and having the Government's witness testifying against the Government's language.

Mr. KANTER. Well, I have never been surprised to hear that the right hand doesn't always know what the left hand is doing.

But I share the Senator's view. It seems to me that as you heard from other witnesses, and as Senator Mathias has said, the history is to the contrary. Ever since 1765, it has been clear that the framers of our Constitution, the early Justices of the Supreme Court and more recent ones, until 1967, considered documentary evidence to be beyond search or seizure.

One other thing I want to mention about Mr. Heymann's comments. He gave an example which one might call a hypothetical horrible of

the Mafia hit lists. It seems to me that the example misses the mark for several reasons.

First of all, a Mafia hit list would not be tangential documentary evidence. It would be an instrumentality of a crime, therefore, would not be covered by the bill at all.

Second, as Senator Bayh pointed out before he left, at page 7, of S. 1790, the third subsection provides an easy way the FBI can make a showing that indeed the evidence will be moved, destroyed or secreted, and that a search can proceed.

In the hypothetical that was given, there would be no difficulty with doing it.

I am really here this morning I think to pull the veil off of the debate that has occurred so far, and to try and broaden it a bit.

It seems to me that adopting title I is a little bit like the road repair crew that notices a pothole in a road that is deteriorating very rapidly, and instead of repairing the road in general to void future potholes, they stick a little bit of tar into the one pothole.

We have *Zurcher* v. *Stanford Daily*. Everybody, even the executive branch comes in and suggests that we ought to fill up the pothole, have some kind of protection for the press.

I would like to suggest this morning that the dangers inherent in the *Zurcher* opinion go well beyond the press to other privileged relationships and to innocent third parties.

I would like to take a couple of minutes to just describe a situation that occurred in Portland, Oreg. I refer you to the records of that case if you want more detailed description.

Milton Stewart is an attorney in Portland, Oreg. I might mention he graduated first in his class, worked with the largest, most staid and respected corporate law firm in the city, Davies, Biggs, and then went out on his own. He has a well-respected corporate practice and was a great supporter of the police department. He even served on their central precinct advisory committee and Mr. Stewart took on a rare, for him, pro bono case at the request of the police department.

One of the officials said, "We have this transit bank that helps out our inebriates in the skid row area for free. It is a nonprofit organization. They need some free legal assistance. Why don't you help them out?" He said, "Sure."

Two years later, the police began talking to him about desiring some information about the transit bank. They were afraid that perhaps some of the transit bank officials had not been reporting all of the funds they had received or returning them to the inebriates who had deposited their funds, a serious matter.

Mr. Stewart indicated consistently that he certainly desired to cooperate with the police, and that he would do anything within his power to aid them, but of course, they had to understand that he had an obligation, a very serious obligation to protect his clients' privileges. And, that if they wanted information from his file, they could obtain it in one of two ways. They could either get written permission from his client, or they could get a subpena from a court.

He explained that a subpena could be contested. The question of privilege could be determined. If the court ordered him to turn it over, he would be more than happy to help.

I might say that at that time, and for all time up to today, he has had no indication from the police or from anyone else, no substantial information at all that his client is involved or was involved in any criminal activity.

The police officers said, "Fine," and left.

A few months later, they called him on the phone, early in the morning and said, "You got a few minutes? We'll be over." He said, "Sure." They showed up with a search warrant.

Now to appreciate the situation, one really needs to read the affidavit. I am not going to bore you with it. It is less than a page and a half long. It is so far from establishing probable cause that there is a crime or that there is evidence of a crime in his office, that it would be laughable, except for the fact that a judge issued a search warrant. And except for the fact that when the police officers arrived at the suite of offices where Mr. Stewart had a sole practice, where he was sharing space with five other unassociated lawyers—I might add, they just moved in 7 days before and he never practiced with any of them before—when the police arrived with that search warrant which was so broad that it didn't even specify his office, they managed to spend several hours searching through the attorney-client files of every one of those lawyers.

Now the Portland police may not be the best police department in the country, but I guarantee you they are not the worst.

I guarantee you this is not an isolated incident. I guarantee you that it is the beginning of a deluge of these kinds of incidents.

Mr. Heymann and the gentleman from the FBI suggested that we haven't had much abuse before. Mr. Justice White made that point in the *Zurcher* case. He relied specifically on the fact that Government had not made a practice of searching newspaper offices.

I ask you why that has been? I don't think it is because the magistrates have been always careful, though most magistrates are careful.

I dont think it is because the FBI and local law enforcement agencies have always been sensitive to privacy interests, though most are.

I suggest to you it is because it was the farthest thing from the imaginings of anyone familiar with the law to suspect that you could go in and search a newspaper office, a lawyer's office, a doctor's office, a priest's office, or an innocent third party for just tangentially relevant documentary evidence, not fruits, not instrumentalities, not contraband.

Well, *Zurcher* has changed that perception with a vengeance. I think it is more than passing coincidence that we have seen in just a few short years since *Zurcher*, a series of searches of law offices in Minnesota, in Oregon, in California, and in other States, a series of searches of churches and church-related activities, a series of searches of doctors' offices, one I might mention where 35 cartons of documents were taken, most of which were returned voluntarily by the agents, and a series of searches of other so-called privileged, confidential relationships.

I would submit for the record that if the *Stewart* case had gone to the Supreme Court, instead of the *Zurcher* case, that the Supreme Court, if it followed the logic of *Zurcher* and had taken cert, only on the question of whether you can search a lawyer's office, that the Supreme Court would have been bound to rule in favor of the Government in that case.

Now it didn't get that far. Our local State district court judge ruled it unconstitutional, but if it had gotten that far, I think the Supreme Court would have been bound to rule that the search was permissible.

I would ask for the record, hopefully for those who read the record a rhetorical question: Would you be any less concerned about knowing that the Stewart search was permitted by the U.S. Supreme Court than you are in knowing that the Stanford Daily's offices have been searched and the Supreme Court has ratified that?

I submit that the answer is "No."

I want to just spend a moment on *Zurcher* and its background. I will leave the bulk of it to my written statement.

Mr. Heymann suggested that it has always been a settled matter of law that the police can search anywhere for any item of evidential value. I think that is plainly incorrect. I was glad that Senator Mathias asked him for some citations. I don't think he will be able to give you any except for *Zurcher*, *Andresen*, and *Couch*, all decided since 1970. I have provided those citations to you if you would like to look at them.

On the contrary, up until at least *Warden* v. *Hayden*, as you have already heard many times, it was clear that the only things that could be searched for or seized were contraband, fruits, or instrumentalities. No innocent third party could knowingly have any of those three things.

If you know that you have contraband, if you know you have fruits of a crime, if you know that you have instrumentalities of a crime, and you don't turn them over to the police, you are guilty of a crime.

Therefore, there were not searches of innocent third parties under that rule, even *Warden* v. *Hayden*, which everybody says abolished the mere evidence rule, really did not. The search there was not for tangential documentary evidence. It was for the clothing worn by a robber during the course of the robbery.

I think most of us would now agree that those were instrumentalities of a crime, not documentary evidence. The *Warden* court itself was quite careful to say that there may indeed be items of evidential value whose very nature, whose very private nature, precludes them from ever being the object of a reasonable search and seizure.

So *Warden* didn't answer this question. It is only *Zurcher* that answered the question differently than it has been answered ever since *Entick* in 1765.

Zurcher is an anomaly. It is supported only by a tenuous bare majority of the court. Justice Powell's concurrence which makes the fifth vote is a limited opinion. I discuss it more fully in my statement.

Therefore, I think it is essential that this Congress take the responsibility to adopt remedial legislation not just to fill the potholes, but to set us back on the right road.

The only way to do that is to merge the three titles and to enact some legislation with some teeth in it that includes an explicit exclusionary rule or that at least is clear from the commentary, from the Senators discussing it, that it intends an exclusionary rule that applies to State officials as well as Federal officials and that insures that the privacy of our citizens will be protected.

Let me comment just briefly on some more technical matters with respect to S. 1790. First of all, I share the view that the reason to believe language is dangerous and does not have a legal content to it. I would agree that we ought to change that to probable cause.

Failing that, it seems to me that at a minimum you need to put in reasonable belief based on specific and articulable facts and circumstances.

That at least would avoid the possibility that a police officer or FBI agent's mere hunch or mere conclusory assertion would be enough to abrogate the subpena first rule which is a perfectly appropriate rule here.

I share the view that there are difficulties with the national security language. I think the primary point which I have already made is that it is essential to, in one form or another, and I am not particularly devoted to one Senator's proposal in terms of language or another, but in one form or another we have to incorporate privileged relationships and innocent third parties.

Returning to Mr. Heymann's testimony and Mr. Revell's, they both made the uncontrovertible point that it would be far easier for law enforcement agents to ferret out crime if we didn't have this bill. No question about that. It would be easier.

It would be a whole lot easier if we abolished the fourth amendment also.

The point of our Constitution is that there are limits that we put on the Government for very good reasons. This bill does not do anything novel. It reinstates the Constitution as it was written and intended.

There are those who say, "Well, we ought to have a special bill because the press has a first amendment protection." The press does have a first amendment protection. It is extremely important that we value it.

However, the attorney-client privilege is also constitutionally protected under the sixth amendment. And the protection for documentary evidence was thought to be constitutionally protected until the 1970's under a combination of the fourth and fifth amendment.

There is no novel nature in this legislation. The novelty comes in the *Zurcher* plurality opinion and in the views of the Government and the FBI in trying to limit this to just a press only bill.

I think perhaps it is appropriate to close with a quote from Mr. Justice Brandeis, who I might add, said, "As long as the *Boyd* case stands, we will know that civil liberties are in good hands here in the United States." That also is a paraphrase.

As I mentioned in my statement, while some of us may remember *Boyd*, it has clearly been all but overruled by the *Zurcher* case.

Mr. Justice Brandeis just about 50 years ago said:

> In a Government of laws, existence of the Government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious.
>
> If the Government becomes a law breaker, it breeds contempt for the law. It invites every man to become a law unto himself. It invites anarchy. To declare that in the administratioon of the criminal law the end justifies the means. To declare that the Government may commit crimes in order to secure the conviction of a private criminal would bring terrible retribution.
>
> Against this pernicious doctrine, this court should resolutely set its face.

Well, the Court didn't do it. It seems to me it is up to the Congress to do it now.

Finally, Mr. Heymann indicated he wasn't aware of any searches of psychiatrists' offices, at least by the Federal Government. I would ask you, who do you think it was that initiated the search of Daniel Ellsburg's psychiatrist's office?

I would ask you, who do you think it was in *Hill* v. *Philpot* that initiated the search for a Federal crime of Dr. Hill's office that resulted in the taking away of 35 cartons of medical documents.

Thank you.

Ms. ATCHESON. May I ask just one quick question then.

Mr. KANTER. Certainly.

Ms. ATCHESON. In the *Milton Stewart* case, once the search and seizure had occurred, Mr. Stewart was not a suspect, so he had none of the protections of the defendant. How did you get into court to get the materials back?

Mr. KANTER. We were very fortunate. We almost didn't get into court because of that. In fact, the Government argued long and hard that there had been no injury because Mr. Stewart was not a criminal defendant, in fact, no charges have ever been filed out of that case. The Government argued we had no standing to appear in court.

As a matter of Federal law, they might well be correct today. Fortunately, Oregon has an old statute that had not been repealed, that had never been used, that we managed to find which provides an innocent third party the opportunity to go into court to get their property back.

So, we were able to convince the judge that statute applied in this case. He then reached the merits and concluded that the search and seizure had been unlawful and ordered the return of all materials.

Ms. ATCHESON. You were lucky.

Mr. KANTER. We were lucky. In Oregon we are lucky.

[The prepared statement of Stephen Kanter follows:]

PREPARED STATEMENT OF STEPHEN KANTER

Mr. Chairman, and Members of the Committee: I am pleased to be able to appear before you on matters of such vital importance to the security and privacy interests of all Americans.

INTRODUCTION

On Wednesday morning, October 10, 1979, in Portland, Oregon, several police officers arrived at the law offices of Milton Stewart with a search warrant for ". . . papers, records, and three sealed manila envelopes . . ." that related to the Transit Bank, a non-profit corporate client of Mr. Stewart's.[1] Despite repeated protestations by Mr. Stewart and the other unassociated lawyers with whom he shared space, the police refused to consult with their legal adviser, to contact the District Attorney, or to reappear before the issuing Magistrate. Instead, they conducted a search not only of Mr. Stewart's office, but of some of the other offices as well, and they rummaged through numerous active attorney-client files, page-by-page. The police remained in the law offices for over two hours, causing obvious embarrassment to the attorneys, their staffs, and their clients. Their activities irrevocably breached the security of attorney-client confidentiality for each client whose file was perused.

Eventually, the officers opened several filing cabinets and seized Mr. Stewart's attorney-client case file and records pertaining to the Transit Bank. No criminal

[1] Copies of the search warrant and Mr. Stewart's affidavit describing the remarkable events of Oct. 10, 1979, are attached as an appendix to this statement.

charges were then pending or have since been filed against the Transit Bank or against anyone else connected with it. Nor has there been any suggestion that Mr. Stewart—who carries on a well-respected general corporate practice and ironically is a member of the Portland Police Central Precinct Advisory Committee—engaged in wrongdoing or would have failed to live up to his obligation as a member of the bar and officer of the court.

On Wednesday afternoon, Mr. Stewart requested representation by the Oregon American Civil Liberties Union and Stephen Houze, Don Marmaduke and I appeared in court with him on Thursday October 11, 1979. After a week of hearings, presiding District Court Judge Philip T. Abraham ruled that attorney-client privileged materials could never be seized under a search warrant, that the particular search warrant and affidavit relied on by the police were facially invalid, and that all seized materials were to be returned to Mr. Stewart. In the matter of the application of Milton Roy Stewart for the return and restoration of property, No. DA–180–730–7910, Amended Order (District Court, State of Oregon, County of Multnomah, Abraham, P.J., Dec. 4, 1979). Within 2 months, the Multnomah County District Attorney had also voluntarily dismissed the forty unrelated criminal cases of the defendants, represented by several of the lawyers sharing space with Mr. Stewart, whose files had been read through by the police.

The Stewart case is, unfortunately, not an isolated incident. On July 25, 1978, police officers arrived to search attorney David O'Connor's office in Minnesota. *O'Connor* v. *Johnson*, 287 N.W. 2nd, 400 (1979). Accounts of similar incidents appear in the record of hearings held by your subcommittee on the Constitution June 22, July 13, August 22, and December 19, 1978. Additional raids on attorneys' offices in other states, including California, have recently been reported. And, of course, we are all painfully aware of the search of the Stanford Daily's newspaper offices that set in motion the chain of events that provided the catalyst for this essential legislation. *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978).

This national rash of inappropriate police incursions into the sanctity of private relationships cannot be passed off as mere coincidence. I am persuaded that there are law enforcement agents who have recognized a disturbing signal from the Supreme Court that it is permissible to search anywhere for anything that may tangentially be involved as evidence in a criminal proceeding, no matter how private the place to be searched or the items to be seized. In candor, it must be said that the recent decisions of the Court have not served to discourage this view. See, e.g., *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978) ; *Andresen* v. *Maryland*, 427 U.S. 463 (1976) ; *Fisher* v. *United States*, 425 U.S. 390 (1976) ; and *Couch* v. *United States*, 409 U.S. 322 (1973). If there is to be meaningful protection for the legitimate expectations of privacy that form the oxygen from which our system breathes individual freedom and liberty, it is this body and the Congress as a whole that must provide that protection.

CONGRESSIONAL POWER AND RESPONSIBILITY

I agree wholeheartedly with my colleagues, Professors Bender and Cohen, and with Mr. Shattuck, that congressional power to enact legislation in this area cannot today be seriously questioned. As a matter of constitutional theory, I hope that the Congress chooses to rely primarily upon its explicit power contained in Section 5 of the Fourteenth Amendment to enforce the due process rights guaranteed to each citizen.

The questions of raw power and constitutional preference aside, there may still be some hesitancy as to the seemliness or efficaciousness of congressional action in matters of constitutional dimension. Ever since *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), the courts have had a special and appropriate institutional role in constitutional adjudication. This role, however, was never meant to strip, and has never stripped, the other branches of government of their competence and responsibility to address and resolve important constitutional issues. In fact, as a fascinating article by Professor Harry Jones demonstrates, many of the central constitutional questions in our history have been appropriately resolved by the legislative and executive branches of government and not by the courts. Jones, "The Brooding Omnipresence of Constitutional Law," 4 Vermont L. Rev. 1, 10–17 (1979). A measure of how seriously scholars take the role of the Congress in constitutional decisionmaking may be gleaned from the fact that

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Professor Paul Brest has devoted the first portion of his excellent Constitutional Law Casebook to the resolution of the Saxbe case by the Congress. P. Brest, "Processes of Constitutional Decision Making" 15–46 (1975).

ZURCHER AND ITS BACKGROUND

I ask your indulgence for an assault on your patience through one more retelling of the oft-told tale of *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978). Mr. Justice White's opinion for the Court in that case seemed to recognize the simple truth that a subpoena duces tecum would be ". . . less intrusive . . ." than the alternative of a search to the legitimate privacy interests of an innocent third party, including a newspaper. 436 U.S. 559. Nonetheless, the opinion woodenly concluded that since the warrant clause of the Fourth Amendment does not explicitly mention newspapers or innocent third parties, there is no constitutional basis for serious recognition of these privacy rights. The Court's opinion also refused to read the Fourth Amendment in the broader context of the First Amendment and thus failed to find special protection even for enumerated constitutionally privileged associations.

Mr. Justice Brennan did not participate in the decision of the *Zurcher* case and Justices Stewart, Marshall and Stevens dissented from the Court's judgment. While Mr. Justice Powell did join as the fifth vote for the majority opinion, he at least recognized the legitimacy of the interests of innocent third parties and of the First Amendment rights of the press. 436 U.S. 569–570. He was able to join Mr. Justice White's opinion only because he naively concluded that the issuing magistrates spread throughout the country could be counted on to adequately protect innocent third parties and newspaper offices from needless or overly intrusive searches.[2]

The *Zurcher* opinion is, therefore, supported by only a tenuous bare majority of the court. It relies on bad history, the selective misuse of precedent, inadequate principles of constitutional construction and bad policy. The opinion ignored the wisdom of Mr. Justice Brandeis in his famous dissent from the judgment in *Olmstead* v. *United States*, 277 U.S. 438, 478 (1928) :

> The makers of our Constitution . . . conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

Instead, the Court gave a strictly literal, choking construction to the words of the warrant clause. This construction deprives the Fourth Amendment of its vitality by ignoring its overriding "reasonableness" clause and by taking the amendment out of the context of the other provisions of the Bill of Rights in contravention of its true meaning as expressed in the seminal case of *Boyd* v. *United States*, 116 U.S. 616, 630 (1886) ("in this regard the Fourth and Fifth Amendments run almost into each other.")[3]

In *Boyd*, the Court held invalid a lower court order requiring Boyd to produce incriminating documentary evidence relevant to a forfeiture proceeding. Mr. Justice Bradley described searches for and seizures of stolen, forfeited, or dutiable goods as ". . . totally different things from a search for and seizure of a man's private books and papers . . ." 116 U.S. 623, and at 627–8 he quoted

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[2] One need only review the totally inadequate affidavit, the warrant and the resulting general, exploratory search (of a kind specially abhorred by our founders) in the Stewart case to become disabused of Justice Powell's assumption. *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971) (reporting that the Attorney General of New Hampshire had been permitted to act as an issuing Magistrate even in a case where he later served as chief prosecutor) ; *Shadwick* v. *City of Tampa*, 407 U.S. 345 (1972) (permitting Tampa to continue its practice of allowing municipal court clerks to issue certain arrest warrants) ; *Connally* v. *Georgia*, 429 U.S. 245 (1977) (ending the lucrative scheme by which Justices of the Peace in Georgia were paid a fee when they issued a search warrant, but received nothing when they refused) ; *U.S.* v. *Davis*, 346 F. Supp. 435 (D.C.S.D. Ill. 1972) (describing the practice of magistrate shopping) ; and *Rooker* v. *Commonwealth*, 508 S.W. 2d 570 (Ky. 1974) (exposing the all too common phenomena of magistrates not even reading search warrant affidavits) present the tip of the iceberg of problems with the myth of the neutral, detached and judiciously thorough issuing magistrate.

[3] One discussion of the importance of reading the Constitution as a whole and using its structure and the juxtaposition of its different provisions in reaching a correct interpretation of any one provision, may be found in Kanter, "Dealing With Death : The Constitutionality of Capital Punishment in Oregon," 16 Willamette L. Rev. 1, 33–35 (1979).

with approval from Lord Camden's famous judgment in *Entick* v. *Carrington and Three Other King's Messengers*, 19 How St. Tr. 1029, 1066 (1765) :

> Papers are the owner's goods and chattels; they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; . . .

Describing the evil of unjustified searches and seizures, Mr. Justice Bradley stated:

> It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, . . . it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. 116 U.S. 630.

The language of *Boyd* remained unchallenged for nearly one hundred years, and a long line of subsequent cases restricted police searches and seizures to items of contraband and fruits or instrumentalities of criminal activity. Under this rule, there was no separate need to protect newspapers or other innocent third parties from wholesale searches. This was accomplished automatically since none of these innocent third parties would be at all likely to possess contraband, fruits, or instrumentalities. These limitations on the objects that could be searched for necessarily prevented the true evil addressed by the Fourth Amendment, that is, the needless and irrevocable invasion of privacy that occurs with every inappropriate search, whether or not anything is seized. Judge Learned Hand made just this point in *United States* v. *Poller*, 43 Fed. 2d 911, 914 (2d Circuit 1930).

In 1967, the United States Supreme Court overruled this so-called "mere evidence" limitation on searches and seizures. *Warden* v. *Hayden*, 387 U.S. 294 (1967). Whatever the merits of the Court's result, the thrust of the Court's opinion is a correct rejection of outmoded hypertechnical property concepts in favor of the privacy considerations at the core of the Fourth Amendment as the appropriate touchstone for Fourth Amendment jurisprudence.[4] The search and seizure in *Warden* involved chasing a suspect robber into a house and seizing items of clothing allegedly worn by the robber during the robbery, not documentary evidence or items that were in any way ". . . 'testimonial' or 'communicative' in nature, . . ." 387 U.S. 302. The holding of *Warden* is, therefore, far from an authorization for the search of a newspaper office, an attorney or physician's office, or the residence of an innocent third party for tangentially relevant documentary evidence. The *Warden* Court itself was careful to say at 387 U.S. 303:

> This case thus does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure.

Subsequent cases have ignored the cautionary language of *Warden* and have applied the consequences of its abrogation of the "mere evidence rule" in situations far removed from the *Warden* facts without developing other adequate safeguards. *Andresen* v. *Maryland*, 427 U.S. 463 (1976) ; *Fisher* v. *United States*, 425 U.S. 391 (1976) ; *Couch* v. *United States*, 409 U.S. 322 (1973) ; and *Zurcher*. It is only after these recent opinions that the magnitude of the threat to civil liberties has become apparent. These decisions, for all practical purposes, dispel the notion that there are sanctuaries of sufficient privacy which remain off limits to the searching eye of government agents, or that there are items of tangential evidential value whose "very nature" places them out of the reach of the hands of these same agents.

It is no wonder that some police officials have concluded that they have been given the green light to search newspaper offices, doctors' offices, lawyers' offices and the homes of other innocent third parties. Every newspaper that covers crime, corruption or does investigative reporting; every attorney who represents criminal defendants; every physician who treats the mentally ill; and every innocent third party who keeps in his home personal correspondence from diverse individuals, some of whom may engage in improper activities; must now recognize that

[4] See also *Katz* v. *United States*, 389 U.S. 347 (1967) (recognizing reasonable expectations of privacy as appropriate decisional criteria in Fourth Amendment cases, overruling *Olmstead* and adopting Mr. Justice Brandeis' view that wire-tapping constitutes a search controlled by the Fourth Amendment.)

without this legislation their homes and offices are no longer preserved inviolate from the sometimes over-zealous encroachments of law enforcement agents engaged in the ". . . often competitive enterprise of ferreting out crime." *Johnson* v. *United States*, 333 U.S. 10, 14 (1948).

Mr. Justice Brandeis, again in *Olmstead*, described *Boyd* as ". . . a case that will be remembered as long as civil liberty lives in the United States." 277 U.S. 474. *Boyd* may still be remembered, but it is clear that *Andresen*, *Fisher* and *Zurcher* have cut out its heart.

It is ironic that Mr. Justice White relied on the limited number of search warrants issued for newspaper premises prior to the *Zurcher* decision as evidence that the *Zurcher* judgment was proper and would not lead to abuse. 436 U.S. 566. This prediction contrasts sharply with the prescient prognostication in the petition for rehearing filed in *Zurcher* correctly worrying that the *Zurcher* rationale could lead searching police officers into lawyers' offices and through their files. Given our experience in just the few short years since *Zurcher*, one must conclude that the reason for the low-level of abuse prior to *Zurcher* did not come from the sensitivity of issuing magistrates or law enforcement agents, but from the nearly universal view that searches of privileged areas or newspaper offices were plainly impermissible. *Zurcher* sharply changed that perception and opened the flood-gates. This Congress has the opportunity to close them again and to shore up the liberty and security of each of our citizens.

S. 1790 AND RELATED LEGISLATION

S. 1790, as proposed, deals effectively with the wide-ranging dangers inherent in the *Zurcher* opinion. Several minor changes could, nonetheless, contribute even further to the Bill's enhancement of individual rights.

1. The language in Title I, page 2, lines 17–25, repeated on page 3, lines 24–25, and page 4, lines 1–6, is potentially ambiguous and dangerously close to supporting a limited national secrets act. One must be at least hypothetically concerned that such language could have been construed, for example, to have permitted a broad search of the offices of the New York Times for the Pentagon Papers and for reporters' work product relating to the Vietnam conflict. The legislative history and purpose of S. 1790 makes such a construction unlikely, but excising the superfluous language would produce a leaner statute without attendant costs.

2. The "reason to believe" language, particularly at page 4, lines 10 and 19; and page 5, line 22, should be amended to read "probable cause" or at least to read "reason to believe based on specific and articulable facts and circumstances." Either amendment would avoid any possibility that a police officer's mere hunch or conclusory assertion could support a broad exception to the "subpoena first" policy of the statute and thereby swallow up the efficacy of the legislative remedy.

3. The language at p. 4, lines 19–25; page 5, lines 1–2; page 6, lines 6–14; and page 7, lines 15–23 is unnecessary and should be deleted. The courts already have adequate power over the subpoena process to prevent dilatory tactics. In a case where the challenge to the validity of a subpoena is frivolous, it is a simple matter for the appellate courts to refuse to stay an order to produce. Where the challenge is not frivolous, no intrusion should be permitted before the merits are finally resolved, since there is no remedy fully commensurate with the invasion of privacy occasioned by an unjustified search.

S. 1790 contains three separate substantive parts: Title I—First Amendment Privacy Protection; Title II—Confidential Information Protection; and Title III—Citizens Privacy Protection. As a matter purely of form, the application of Ockham's razor would suggest that the three Titles be consolidated into one. This particular nit is worth picking because the distinct Titles increase the prospects that Title I will be adopted in response to widespread dismay over *Zurcher*, while Titles II and III are rejected or seriously diluted. See H.R. 3484 as amended and approved by the Subcommittee on Courts, Civil Liberties and the Administration of Justice, of the House Committee on the Judiciary. February 26, 1980.

It is understandable why Congressional attention has focused on the protection of First Amendment activities in the wake of *Zurcher*, but there is no substantive basis for refusing to extend protection to other privileged relationships or to innocent third parties. There would be no less concern today if the Court had authorized the search of an innocent doctor or lawyer's office rather than the newspaper office of the Stanford Daily. Such a decision, which would be

arguably consistent with the *Zurcher* rationale, would have given urgency to the passage of Title II instead of Title I. Congress need not wait for such a decision, or cling to the hope that none will be forthcoming. Favorable action on the substance of all three Titles of S. 1790 will maximize our citizens' valued privacy interests without jeopardizing legitimate law enforcement efforts to combat crime.

CONCLUSION

In *Boyd*, the Supreme Court said that ". . . illegitimate and unconstitutional practices . . . can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance." 116 U.S. 635. Regrettably, the *Zurcher* Court failed to apply this first lesson of constitutional law. The Court did, at least, invite the Congress and the Executive to provide added protection for the citizens' privacy. 436 U.S. 567. I, therefore, urge this Congress to adopt S. 1790 as originally proposed or with one or more of the minor amendments suggested herein.

It is appropriate to close with a final quote from Mr. Justice Brandeis:

> In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law breaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine, this Court should resolutely set its face. *Olmstead* v. *United States*, 277 U.S. 485 (Brandeis, J. dissenting).

The *Zurcher* Court failed to so set its face. The duty, the responsibility and the challenge have, therefore, devolved upon the members of this Congress.

Thank you.

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Ms. ATCHESON. Dr. Roeske?

TESTIMONY OF DR. NANCY ROESKE, INTERSPECIALTY ADVISORY BOARD, AMERICAN MEDICAL ASSOCIATION AND THE AMERICAN PSYCHIATRIC ASSOCIATION

Dr. ROESKE. Distinguished members of the committee, and staff. I am Nancy Roeske, M.D. I am a professor of psychiatry and director of undergraduate curriculum and coordinator of medical education at Indiana University School of Medicine.

I also serve the American Psychiatric Association as its representative to the American Medical Association's Interspecialty Advisory Board. It is in both of those capacities I am here today.

The American Psychiatric Association and the American Medical Association mutually seek to promote the best interests of patients and those actually or potentially making use of physician and mental health services.

I would like to comment at this point that I hope that everyone in this room will listen to my presentation within the following context, for I speak not only as a physician, I speak as a patient and I speak to all of you here as you are patients or will be patients of physicians.

Therefore, this testimony is of utmost importance to all of us.

We are grateful for an opportunity to testify before this committee.

In modern times, the scope of privacy afforded by the fourth amendment to innocent third parties has been largely undefined.

However, the Supreme Court's *Stanford Daily* case substantially limits whatever degree of privacy was thought to have existed for innocent citizens.

Physicians obligate themselves to protect the confidence of their patients. This principle has been relied upon by the public, and has been, in a number of States, an expression of public policy.

The obligation of physicians to keep confidential the communications of their patients is important for two reasons. First, much of the information related by patients to their physicians is highly personal.

Patients have every right to expect that the intimate and personal information communicated to physicians will remain private.

Second, the assurance of the confidentiality encourages patients to be candid with their physicians and candor is essential to the effective diagnosis and medical management of the patients' ailments.

Even with the assurance of confidentiality some patients are reluctant to speak openly with their physicians. If the confidentiality of the patients' communication could no longer be protected, such reluctance could become widespread, hindering the physician's ability to provide needed medical care to his or her patients.

We applaud the leadership taken by the chairman, Senator Bayh, and Senator Baucus, in introducing corrective legislation on privacy protections.

Indeed, the APA and the AMA stand together to endorse the principles set forth in S. 1790, which addresses the need to extend protection of all innocent third party records, held in privileged relationship or those protected by the first amendment rights, from the improper search and seizure.

We believe that the U.S. Supreme Court did not address appropriately the confidential nature of information and the medical records involved in the physician-patient relationship and other similarly privileged relationships which occur in the practice of medicine.

I know you are all familiar with Senator Bayh's statement introducing this legislation which supports my above comments.

Recently, there has been a landmark Federal district court decision which struck down as unconstitutional a State medicaid fraud law as violating the patient's right to privacy and the physician's right to be free from unreasonable search and seizure.

The court concluded in that case that there was a substantial probability that the enactment "intrudes significantly into the patient's rights to make decisions regarding psychiatric care in a manner that is unnecessary to achieve the State's commendable purposes."

I would point out in two celebrated cases; namely, *Whalen* v. *Roe* and *Nixon* v. *Administrator of General Services*, that the court concluded that the proper test implied by those two cases "is to balance the State interests served by a regulation against the intrusion into an individual's privacy."

Also, we would like to quote from Dr. Maurice Grossman's testimony before the Judiciary Constitution Subcommittee, held on August 22, 1978.

I quote in part from his comments:

> The problem of damage to patients is not merely the patients who are in treatment, not merely the patients whose records would be searched but the mere publicity that any district attorney can get a search warrant and grab the records, in spite of any efforts of the psychiatrists to protect them, is going to keep many potential patients from seeking treatment who desperately need that treatment.

At this point, I would like to elaborate on a case that was mentioned much earlier this morning, when it was brought out that the presenter could understand why psychiatrists records might be kept confidential, but did not feel it was necessary for an orthopedic surgeon's records to be kept confidential.

The example was given that the patient seeking the orthopedic surgeon's care had a pain in his knee, or perhaps it was his hip, I believe it was his knee.

Now I would say as an educator, that orthopedic surgeons or any physician would know that the patient may present with a pain in the knee or the hip, but he really may be concerned about the fact that he is sexually impotent. Any good physician will then determine the degree of his depression and may find it comes from or is related to a significant relationship.

All of that information, including probably the name of the significant other, will be in that orthopedic surgeon's records.

I submit that these physicians should also have the same kind of privilege that was mentioned earlier by the lawyer regarding psychiatrists.

The abuse of search warrants continues. For example, the same district attorney of *Stanford Daily* used a search warrant on the public defender's office in his own county.

We attach an article from the San Francisco Chronicle of August 29, 1979, as further information in that regard.

The continued dangerous encroachment to the right of privacy authorized by the *Zurcher* decision can set a dangerous precedent whereby our protected rights can be diluted.

We must be ever concerned that the call for law and order not be used as an excuse to diminish these rights, as has been the case historically when totalitarian governments establish control over their citizens.

Despite all of the changes in medicine in the last 2,000 years, one constant is the patient's desire for privacy. That is a key issue and is one of privacy protection and the privileged nature of communications between physician and patient.

Aside from the general intrusion of the confidential relationship between the psychiatrist and patient, the search procedure is particularly pernicious since it does not allow the physician to challenge the disclosure of his records on the ground that they are both privileged and confidential.

Further, a research, particularly of a physician's office, raises the distinct likelihood that the police will also have access to and review the records of the patients who are wholly unrelated to the matter under investigation, such as the San Francisco case noted previously.

A search warrant need not be served on the third party before his or her premises are searched. The third party need not be present for a search to ensue.

A search warrant may be utilized at any time, whether or not an office is open or not. While all of this may make procurement of the documents in question more prompt and while it may assure against the destruction of records—but we know of no reason for a physician to destroy a patient's records—the warrant procedure has dangerous drawbacks: the absence of an adversarial proceeding and the increased invasion of privacy.

As already has been mentioned about the *Ellsberg* case, and I think that is familiar to everyone in this room—the *Zurcher* case is contrary to established policy of the American Psychiatric Association and of the American Medical Association with respect to the privileged nature of the patient-physician relationship and the ethics of our practice.

Therefore, we urge and support the enactment into law legislation which would insure that when any person acting under color of law, whether a Federal, State or local official, seeks evidence of a crime from a citizen's home or business who is not suspected of being involved in the crime, the proper procedure is to serve a subpena duces tecum rather than conduct a surprise search by use of a search warrant.

Mr. Chairman, the APA and the AMA have, for some time, been grappling with the complex issue of confidentiality—notably those assurances needed to protect the confidentiality of medical records—for many of the reasons already enunciated in our testimony.

We both have drafted model laws with regard to this issue which we believe carefully draws the important line between the requirement of confidentiality of medical records and access to medical information for legitimate purposes.

In closing, I think it would be helpful to recall that the strongest argument in support of the goals of your legislation with respect to the practice of psychiatry and medicine is the testimony of Philip Heymann, Assistant Attorney General for the Criminal Division of the U.S. Department of Justice.

On December 19, 1978, he testified before this committee, and I quote, "I, myself, think that the search of the psychiatrists' files is a very dangerous and questionable practice."

He later testified about purpose categories of people that should be protected in that. "There are however, categories that seem to be easy and obvious. The psychiatrist's files fall in that category."

Once again, we—I, representing these two associations appreciate the opportunity to appear before the committee. I welcome an opportunity of working with the committee and Congress to achieve the goal of insuring the confidentiality of medical records and providing fourth amendment protection to all.

We are pleased to respond to any questions, and as has been stated earlier, I am aware a fuller extent of my comments will be included in the record. I would ask the accompanying material also be placed in the official record.

Senator MATHIAS. Without objection, that is so ordered.

I noticed that in the summary of your statement you did not mention Senate bill 115.

Dr. ROESKE. Is that not mentioned in all of our material?

Senator MATHIAS. Well, I don't think you mentioned it orally. You may have it in the record, the prepared statement.

Dr. ROESKE. I apologize. I think it is there.

Senator MATHIAS. My ears are sensitive to those numbers. Those are magic numbers.

Dr. ROESKE. I apoligize. I was trying to keep the time down and within the alloted time frame.

Senator MATHIAS. Well, I would just point out to you that whether or not it is there, that S. 115 is of course, legislation which would have precluded the 1973 search of the Stanford Psychiatric Clinic, because under S. 115, the police would have had to go for a subpena, and the clinic then could have raised the privilege.

Assuming of course, that the privilege is recognized under State law.

I think that is an important consideration coming from the point of view of the organizations you represent here today.

Dr. ROESKE. I would quite agree. I think we will review our written statement quite carefully, and with your permission, if that is not included in the written statement, we will so include it.

I agree with you.

Senator MATHIAS. You have that privilege. The committee would be glad to hear further from you on that or any other point you might want to raise in the light of today's testimony.

The record will remain open for a reasonable time so you can file such information.

Thank you very much.

Dr. ROESKE. You are welcome.

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[The prepared statement and additional material submitted by Dr. Roeske follow:]

PREPARED STATEMENT OF DR. NANCY ROESKE, ON BEHALF OF THE AMERICAN MEDICAL ASSOCIATION AND THE AMERICAN PSYCHIATRIC ASSOCIATION

Mr. Chairman and distinguished Members of the Committee: I am Nancy Roeske, M.D. and am Professor of Psychiatry, Director of Undergraduate Curriculum, and Coordinator of Medical Education for the Department of Psychiatry at the Indiana University School of Medicine. I also serve as the American Psychiatric Association's representative to the American Medical Association's Interspecialty Advisory Board.

The American Psychiatric Association and the American Medical Association mutually seek to promote the best interest of patients and those actually or potentially making use of physician and mental health services. We are grateful for the opportunity to testify before this Committee to discuss our concerns about the significant implications of the Supreme Court's 1978 decision in *Zurcher* v. *Stanford Daily* upon the confidentiality of medical records and the invasions that occur by law enforcement officials into the security and privacy of physicians' offices.

In modern times, the scope of privacy afforded by the Fourth Amendment to innocent third parties had been largely undefined. However, the Supreme Court's *Stanford Daily* case substantially limits whatever degree of privacy was thought to have existed for innocent citizens.

Physicians obligate themselves to protect the confidence of their patients. This principle has been relied upon by the public and has been, in a number of States, an expression of public policy.

The obligation of physicians to keep confidential the communications of their patients is important for two reasons. First, much of the information related by patients to their physicians is highly personal. Patients have every right to expect that the intimate, personal information communicated to physicians will remain private. Second, the assurance of confidentiality encourages patients to be candid with their physicians, and candor is essential to effective diagnosis and medical management of the patient's ailments.

Even with assurances of confidentiality, some patients are reluctant to speak openly with their physicians. If the confidentiality of patient communications could no longer be protected, such reluctance could become widespread, hindering the physician's ability to provide needed medical care to his or her patients.

We applaud the leadership taken by you, Mr. Chairman, and Senator Baucus, in introducing corrective legislation on privacy protection. Indeed, the APA and the AMA stand together to endorse the principles set forth in S. 1790 which addresses the need to extend protection of all innocent third party records held in privileged relationships or those protected by First Amendment rights from improper search and seizure. We believe that the United States Supreme Court did not address appropriately the confidential nature of information and the medical records involved in the physician/patient relationship and other similarly privileged relationships which occur in the practce of medicine.

You, Senator Bayh, as Chairman of the Judiciary Subcommittee on the Constitution, set the tone of protecting the inalienable right of all innocent third parties from possible abuse of the search warrant procedure when, in introducing S. 1790, you stated:

"Doctors, lawyers, and other professionals who have in their possession confidential information should not be subject to forcible entries and rifling through files any more than newspapermen should. They, like the press, should be given the opportunity to provide law enforcement authorities the precise material needed for investigation of a crime by voluntarily complying with a subpoena."

A recent landmark Federal District Court decision struck down as unconstitutional a state Medicaid fraud law as violative of a patient's right to privacy and a physician's right to be free from unreasonable search and seizure. The statute permitted government prosecutors to obtain administrative search warrants issued under a probable cause standard for a complete inspection of the confidential files of psychotherapists. The Court also found that if the *status quo* were allowed to continue, there was a "substantial probability of irreparable harm" to the plaintiffs.[1]

[1] *Hawaii Psychiatric Society* v. *Ariyoshi*, No. CV79-0113 (D. Hawaii, Oct. 22, 1979).

The Court concluded that there was a substantial probability that the enactment "intrudes significantly into the patients' rights to make decisions regarding psychiatric care in a manner that is unnecessary to achieve the State's commendable purposes" (uncovering Medicaid fraud) and "violates the right to avoid unjustified disclosure of personal information." The Court also noted a recitation of leading United States Supreme Court cases that have "recognized an individual's right to make decisions free from unjustified governmental interference." In *Whalen* v. *Roe* (429 U.S. 589, 1977), the Supreme Court implicitly included medical decisions "within this protected zone of autonomy." Citing *Whalen* v. *Roe*, *supra*, and *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977), (the Nixon tapes), the Court concluded that the proper test implied by those two cases "is to balance the state interests served by a regulation against the intrusion into an individual's privacy." The compelling interest served by the law must "outweigh" the right to confidentiality inherent in the psychotherapist-patient relationship. (*McKenna* v. *Fargo*, 451 F. Supp. 1355 (D.N.J. 1978) ; *Caesar* v. *Mountanos*, 542 F.2d 1064 (9th Cir. 1976).

Also, we would like to quote from Dr. Maurice Grossman's testimony before the Judiciary Constitution Subcommittee (August 22, 1978). Dr. Grossman, one of the world's leading authorities on medical record privacy, stated:

"The problem of damage to patients is not merely the patients who are in treatment, not merely the patients whose records would be searched but the mere publicity that any district attorney can get a search warrant and grab the records, in spite of any efforts of the psychiatrists to protect them, is going to keep many potential patients from seeking treatment who desperately need that treatment.

"This is no mere conjecture. These are actual facts. I know of at least two instances where one patient in treatment, having heard of a California Supreme Court decision requiring a psychiatrist to breach that confidentiality, stayed in panic for over a year because of fantasies, fears, and memories of violence on part of the patient, and the terror that, if these instances were ever discussed in treatment, I, as the therapist, would be obligated to report this patient to the civil authorities.

"It was only after we worked through some of the nature of the terror that the whole story came out and therapy was able to proceed.

"Another patient in a similar situation debated for six months about that same decision, until he read in a newspaper or magazine somewhere that I, in my official capacity, was opposing that, and only then did he feel safe enough to give the information that permitted him to conclude his treatment.

"These are not merely theoretical conjections. They actually have a very direct impact on the welfare of people already in treatment but, even more, people who need treatment who are not going to seek it out of terror of disclosure."

The abuse of search warrants continues. For example, the same District Attorney of Stanford Daily used a warrant on the Public Defender office of his own county. The attached San Francisco Chronicle story (Aug. 29, 1979), which we request be included in the record, tells of another episode. Briefly, the story is one in which a suit was brought to recover patient records seized at a drug clinic at a San Francisco General Hospital. The criminal basis for the search warrant action was an unsolved murder of three employees of a drugstore on February 4, 1979. Numerous fingerprints were obtained. The search warrant stated that shortly thereafter a Bay Area police department notified the police of jurisdiction "(we) received a telephone call from an anonymous citizen informant . . . that an acquaintance of his (apparently not identified) had a conversation with the perpetrators of the robbery/homicide . . ." The conversation allegedly had to do with planning the robbery for drugs and obtaining guns to be used. This conversation allegedly took place at the clinic to be searched to obtain all records on all patients for a specified period, to obtain photos and fingerprints of all those who visited the clinic. While the alleged motive may seem worthy, the actual results were police departments throughout the San Francisco Bay Area getting photos and fingerprints (if they were available) of all narcotic addicts trying to break the habit at that clinic. When photos and prints records were demanded by the California Department of Mental Health of all drug treatment centers, it was for the purpose of avoiding duplicate registration of patients on methadone treatment, with the usual promise of protected confidentiality. These efforts were resisted by all the clinic directors throughout the state, based on the Federal legislation protecting confidentiality. Everyone

knew that any suggestion for police surveillance would devastate any drug treatment program. It was for that reason that Congress wrote that section into the alcohol and drug abuse treatment program law (Public Law 92–225 and Public Law 93–282). Let me share with you the legislative history of Congressional views on the critical nature of confidentiality and treatment. Senate Report 92–700 states on page 33:

"The conferees wish to stress their convictions that the strictest adherence to the provisions of this section is absolutely essential to the success of all drug abuse prevention programs. Every patient and former patient must be assured that his right to privacy will be protected. Without that assurance, fear of public disclosure of drug abuse or of records that will attach for life will discourage thousands from seeking the treatment they must have if this tragic national problem is to be overcome.

"Every person having control over or access to patients' records must understand that disclosure is permitted only under the circumstances and conditions set forth in this section. Records are not to be made available to investigators for the purpose of law enforcement or any other private or public purpose or in any manner not specified in this section."

House Report 93–759, on pages 10–11, also stated:

"In section 333 of the 1970 Act, Congress attempted to protect the confidentiality of patient records of alcoholics and alcohol abusers by authorizing the Secretary of Health, Education and Welfare to award an absolute privilege to withhold names of subjects of research. This limited provision has proved to be unsatisfactory and, in 1972, Congress included as section 408 of the Drug Abuse Office and Treatment Act a confidentiality section with respect to records of drug abusers that imposes a duty to maintain the confidentiality of drug abuse patient records as distinguished from authorizing the Secretary to confer a privilege of doing so. This approach has been adopted by the Committee in amending section 333 of the Alcohol Act with respect to records of alcoholics and drug abusers. In implementing the authority to promulgate regulations under section 333, the Committee expects the precedents established under Section 408 of the Drug Abuse Act to be followed in the absence of any compelling reason not to do so."

The continued dangerous encroachment to the right of privacy authorized by the *Zurcher* decision can set a dangerous precedent whereby our protected rights can be diluted. We must be ever concerned that the call for "law and order" not be used as an excuse to diminish these rights, as has been the case historically when totalitarian governments establish control over their citizens. Despite all of the changes in medicine in the last 2,000 years, one constant is the patient's desire for privacy. The key issue is one of privacy protection and the privileged nature of communications between physician and patient.

As pointed out by Supreme Court Justice Stevens in his dissent on the *Stanford Daily* case, the threat of *Zurcher* goes far beyond the press. Justice Stevens stated:

"Countless law abiding citizens—doctors, lawyers, merchants, customers, bystanders—may have documents in their possession that relate to an ongoing criminal investigation. The consequences of subjecting this alarge category of persons to unannounced police searches are extremely serious. The *ex parte* warrant procedure enables the prosecutor to obtain access to privileged documents that could not be examined if advance notice gave the custodian an opportunity to object. The search for the documents described in a warrant may involve the inspection of files containing other private matter. The dramatic character of a sudden search may cause an entirely unjustified injury to the reputation of the persons searched."

Aside from the general intrusion of the confidential relationship between psychiatrist and patient, the search procedure is particularly pernicious since it does not allow the phsyician to challenege the disclosure of his records on the ground that they are both privileged and confidential. Further a search, particularly of a physician's office, raises the distinct likelihood that the police will also have access to and review the records of patients who are wholly unrelated to the matter under investigation, such as the San Francisco case noted above. A search warrant need not be served on the third party before his or her premises are searched. The third patry need not be persent for a search to ensue. A search warrant may be utilized at any time, whether or not an office is open or not. While all of this may make procurement of the documents in question more prompt and

while it may assure against the destruction of records—but we know of no reason for a physician to destroy a patient's records—the warrant procedure had dangerous drawbacks: the absence of an adversarial proceeding and the increased invasion of privacy.

In contrast to a search warrant, a subpoena *duces tecum* allows the doctor or any innocent third party being served, the opportunity to litigate the privilege issue. Further, it also restricts turnover, should such a privilege claim fail, to the documents specifically at issue, thereby protecting the records, property and perhaps reputation of others. Moreover, the subpoena process permits an individual to take advantage of the due process under law provided by the Constitution.

The United States Justice Department in previous testimony before your Constitution Subcommittee, suggested that the special restrictions that legislation places upon the utilization of a warrant are unnecessary and further burden a closely watched and well-defined judicial decision-making process. Such a Justice Department position fails to admit that the Justice Department is composed of human beings who set Justice Department policy. It imputes only good and honorable intentions to those in high office and argues that, therefore, more stringent restrictions on the use of search warrants against innocent third parties in the wake of *Zurcher* are unnecessary.

I would remind you of the *Ellsberg* case. The office of his psychiatrist, Dr. Fielding, was burglarized and records stolen. *Zurcher* would have made such an invasion lawful for a warrant and would now be permissible.

Zurcher is contrary to established policy of the American Psychiatric Association and the American Medical Association, with repsect to the privileged nature of the patient/physician relationship and the ethics of practice. It forces the breach of that confidential relationship, the *raison d'etre* of the medical relationship, by permitting documents to be taken wthout authorization of the patient.

This is in contrast to the use of a subpoena which permits the physican/physchiatrist and patient each to challenge the legal compusion to release this confidential material. The warrant permits none.

Not only does *Zurcher* potentially weaken existing patient/physician relationships, but has the even more serious danger of sufficiently heightening the stigma now attached to mental illness so as to drive those in need of care away from seeking help in the first place. The American Psychiatric Association and the American Medical Association remain confident that this Committee is very much aware that the stigma associated with mental illness and emotional problems is still so strong that millions of Americans are reluctant to admit they need help.

The President's Commission on Mental Health clearly points out the fears and concerns about the stigma of mental illness. It states:

"The misunderstanding and fear which surround mental health services and to the people who are receiving or have received those services. More people now seek mental health care, and those who do often seek care sooner than they might have in the past. But many who need help do not seek it, and many who have received help do not admit it."

We are hopeful that this Committee will share our concerns about the dangers of and implications of the *Zurcher* decision, as one not limited to the media. We urge and support the enactment into law legislation which would ensure that when any person acting under color of law, whether a Federal, state or local official, seeks evidence of a crime from a citizen's home or business who is not suspected of being involved in the crime, the proper procedure is to serve a subpoena *duces tecum* rather than conduct a surprise search by use of the search warrant.

Mr. Chairman, the APA and the AMA have, for some time, been grappling with the complex issue of confidentiality—notably those assurances needed to protect the confidentiality of medical records—for many of the reasons already enunciated in our testimony. We both have drafted model laws regarding this issue which we believe carefully draws the important line between the requirement of confidentiality of medical records and access to medical information for legitimate purposes. We would like to ask that both model was be made part of the hearing record.

Once again, we appreciate the opportunity to appear before the Committee and welcome the opportunity of working with the Congress to achieve the goal of insuring the confidentiality of medical records and providing Fourth Amendment protection to all. We are pleased to respond to any questions you may have.

[Am J Psychiatry 13 :1, January 1979]

OFFICIAL ACTIONS—AMERICAN PSYCHIATRIC ASSOCIATION

MODEL LAW ON CONFIDENTIALITY OF HEALTH AND SOCIAL SERVICE RECORDS

This document was approved by the Board of Trustees at its September 1977 meeting and by the Assembly Executive Committee at its February 1978 meeting. It was prepared by the Task Force on Confidentiality of Children's and Adolescents' Clinical Records [1] and the Committee on Confidentiality.[2]

[1] The Task Force on Confidentiality of Children's and Adolescents' Clinical Records (1976–1977) included Frank Rafferty, M.D., chairperson, John Looney, M.D., Herbert Sacks, M.D., and Lenore Petty, M.D., Falk Fellow. Of Counsel: Sandra Nye, J.D., M.S.W.

[2] The Committee on Confidentiality (1976–1977) included Jerome Beigler, M.D., chairperson, Ben Bursten, M.D., Maurice Grossman, M.D., Alan McLean, M.D., Don Mosher, M.D., Herbert Sacks, M.D., Hugo Van Dooren, M.D., and Robert Friedman, M.D., Falk Fellow. Of Counsel: Sandra Nye, J.D., M.S.W.

1. Scope

All confidential information is subject to the provisions of this Act. Except as hereinafter provided, or otserwise specifically required by federal, state or local law, no person shall, without the authorization of the paient/client or his/her authorized representative:

(a) Disclose or transmit any confidential information together with a patient/client identifier to any person, or

(b) Disclose or transmit a patient/client identifier to any person, or

(c) Disclose or transmit confidential information if the person disclosing or transmitting it has reason to believe that the recipient may have a patient/client identifier for such information.

2. Definitions As Used in This Act

(a) "Confidential information" means:

(i) The fact that a person is or has been a patient/clinic;

(ii) Information transmitted in confidence between the patient/client and service provider in the course of service provision;

(iii) Information relating to diagnosis, facts necessary to the provision of services, or treatment, transmitted in confidence between members of the the patient/client's physical, mental or emotional condition;

(iv) Information relating to diagnosis, facts necessary to the provision of service, or treatment, transmitted between any of the persons specified in (a) (ii) and (iii) above, and persons who participate in the accomplishment of the objectives of diagnosis, fact-finding, or service under the supervision of, or in cooperation with the service provider;

(v) Any diagnosis or opinions formed by the service provider regarding patient/client's family and the service provider;

(vi) Any advice, instructions or prescriptions issued by the service provider in the course of diagnosis, treatment, or provision of other service;

(vii) Any summary, resumé or characterization of the substance, or any part of the information decribed in sub-sections (f), (i) through (v) of this section 2; and

(viii) Any record, recording, or notation of information described in subsection (f), (i) through (vi) of this section 2, in whatever form and by whatever means recorded or noted.

(ix) Personal information governed by the School Student Records Act is hereby excluded from the application of this statute.

(b) "Patient/client" means a person who consults, is examined, interviewed, treated, or is otherwise served to some extent by a service provider, or a clinical researcher, as hereinafter defined, with regard to a medical, mental, or emotional condition or social deprivation or dysfunction.

(c) "Patient/client identifier" means:

(i) The patient/client's name or other descriptive data from which a person well acquainted with the client might, with reasonable certainty, recognize such patient/client as the described person, or

(ii) A code, number, or other means to be used to match the patient/client with certain confidential information regarding him/her.

(d) "Authorized representative" means:

(i) A person empowered by the patient/client to assert or to waive the confidentiality, or to disclose or consent to the disclosure of confidential information, as established by this Act. Such person shall not, except by explicit authorizations, be empowered to waive confidentiality or to disclose or consent to the disclosure of, confidential information;

(ii) If the patient/client is incompetent to assert or waive his rights hereunder, or is in an apparently life threatening or emergency situation, a guardian or conservator, except that pending appointment of such guardian or conservator, the nearest available relative of such patient/client may maintain or waive the confidentiality;

(iii) If the patient/client is deceased, his personal representative or next of kin or

(iv) If the patient/client is less than twelve (12) years of age, his parent or other custodian or guardian.

(e) "Diagnosis, fact-finding, or provision of service" includes observations made for purposes of same and all efforts to prevent, ameliorate, or otherwise overcome the effects of medical, mental or emotional disorders or social deprivation or dysfunction.

(f) "In confidence" means, private disclosures made or intended to be made, so far as the discloser is aware, to no other persons except

(i) The intended recipient;

(ii) Those who are present to further the interest of the patient/client in consultation, examination or interview, diagnosis, treatment, or other service provided;

(iii) Those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of diagnosis or treatment, including members of a therapy group of which the patient/client is a participant, and members of the client's family: supervisors or other persons participating in consultation, examination or interview, diagnosis, or treatment, or other service provided under the direction of the provider; third-party payers; and

(iv) Persons reasonably believed to be engaged in good faith in training programs relevant to the activities of the service provided.

(g) "Person" means any natural person, corporation, association, partnership, and any state, local or federal government, or any agency or other part thereof, including a court.

(h) "Service provider" means any person authorized by statute to provide medical, psychological, psychotherapeutic, psychoanalytic, child welfare and/or other social services: any person reasonably necessary for evaluation, diagnosis, consultation, treatment, or care under the supervision of the provider: and, any person reasonably believed by the client to be so authorized or engaged.

3. Authorized Disclosures

(a) Consent may be given by a patient/client who is twelve (12) years of age or over or by his authorized representative, for the transmission or disclosure of confidential information. Such consent shall be effective only if it is in writing and sgned, and also specifies the nature and content of the information to be disclosed, to what person such information may be transmitted or disclosed, and to what use the transmitted or disclosed information may be put. Such specifications shall constitute the limits of the authorization. Every person requesting such authorization shall inform the patient/client or authorized representative that refusal to give such consent will in no way jeopardize his right to obtain present or future service, except where and to the extent disclosure is necessary for service to said patient/client, or for the substantiation of a claim for payment from a person other than the patient/client. The patient/client, or his authorized representative, may withdraw any such consent at any time in writing transmitted to and received by the person authorized to receive such confidential information. Upon receipt of such withdrawal, the person previously authorized to receive said information shall exercise reasonable care in promptly notifying all persons who had previously transmitted information on the basis of said consent, or who might reasonably be expected to do so in the future, that the prior consent has been

withdrawn. If consent had been obtained by a person other than the person thereby authorized to receive said information, the person who obtained said consent shall, upon request, promptly, and in the exercise of reasonable care, assist the patient/client in ascertaining the correct name and address to which the withdrawal should be sent. Withdrawal of such consent shall have no effect upon disclosures made prior thereto.

(b) If the patient/client is under twelve (12) years of age or incompetent, consent may be given for the transmission or disclosure of confidential information by the patient/client's authorized representative.

4. Disclosures Without Authorization

Consent from the patient/client shall not be required for the disclosure or transmission of confidential information in the following situations, as specifically limited:

(a) *Within the service-providing facility.*—Confidential information may be disclosed to other individuals employed by the service provider, and to officially designated auditors and surveyors for accreditation, when and to the extent to which the performance of their duties in employment, audit or accreditation requires that they have access to such information. For purposes of this subsection (a), (i) persons engaged in good faith in training programs at a service providing facility and their clinical supervisors are to be considered as being employed by the service provider and may have access to such records and information to the extent reasonably required in their training and duties, but, (ii) individuals employed by the service provider or audit or who are involved in financial audit, preparation of bills or who are otherwise engaged in the collection of charges for services to a patient/client shall not, by virtue thereof alone, have access to confidential records and information, except with respect to names, addresses, and other information essential to the preparation and submission of bills and claims for payment of charges for services to a patient/client.

(b) *Clinical supervisors or trainers not employed by the service-providing facility.*—Confiidential information may be diclosed to supervising or training clinicians by service providers who are in training or supervision under a clinician or bona fide training program, whether or not such supervising clinicians are employed by or affiliated with the service-providing facility. For purposes of this subsection (b), the clinical supervisor or trainer receiving such confidential information shall bear the same position and responsibility with regard to the protection thereof as the service provider.

(c) *Protection from serious injury or disease; The Abused and Neglected Child Reporting Act.*—Confidential information may be disclosed, (i) in accordance with the provisions of the Abused and Neglected Child Reporting Act; and (ii), when the statute creating a legislative commission delegates authority to study the needs of minors or incompetents, and to promote services for the protection of the rights and interest of minors or incompetent persons who are in need of, or provided with medical, social and mental health services: subject, however, to guidelines established by the director of the agency providing the service with respect to the validity of the request for material and to the proper precaution as to its confidentiality and use; (iii) when and to the extent a treating or diagnosing service provider, in his sole discretion, determines that such disclosure is necessary to initiate or continue civil commitment proceedings under the laws of this state or to otherwise protect the patient/client or other person against a clear, imminent risk of serious physical or mental injury or disease or death being inflicted upon the patient/client, or by the patient/client on himself or another; and (iv) when and to the extent such is in the sile discretion of the treating or diagnosing clinician, necessary to the provision of emergency medical care to a patient/client who is unable to assert or waive his rights hereunder and there is no relative or other third party available to give consent. Any person, institution, or agency, under this Act, participating in good faith in the making of a report under the Abused and Neglected Child Reporting Act, or in the disclosure of confidential information otherwise in accordance with this provision, shall have immunity from any liability, civil, criminal or otherwise, that might result by reason of such action.

(d) *Billing and claims.*—Information supplied by a service provider to persons involved in the billing for, or collection of, charges for services, shall be limited to names, addresses, dates on which services were performed, and the amount of charges for such services, and shall not otherwise indicate the nature of the conditions for which services were provided. In the event of a claim in any civil action

for payment for services, no other confidential information except names, addresses, the dates on which services were rendered, and the amount of charges for such services shall be discolsed in pleadings and motion, except to the extent necessary (i) to respond to a motion of the client for greater specificity, or (ii) to dispute a defense or counterclaim.

(e) *Patient/client-litigant exception.*—Except as provided in paragraph (ii) of this subsection (e)

(i) Confidential information may be disclosed in a civil or administrative proceeding in which the client introduces his physical, mental or emotional condition or any aspect of his diagnosis or treatment for such a condition as an element of his claim or defense if and only to the extent the court in which the proceedings have been brought, or, in the case of an administrative proceeding, the court to which an appeal or other action for review of an administrative determination may be taken, finds, after *in camera* examination of testimony or other evidence, that it is relevant, probative, not unduly prejudicial or inflammatory, and otherwise clearly admissible: that other satisfactory evidence, such as the results of a present examination of the patient/client by an examining clinician other than the service provider, or stipulations of fact between the parties, are demonstrably unsatisfactory as evidence of the facts sought to be established by such evidence; and that disclosure is more important to the interests of substantial justice than protection from injury to the provider-patient/client relationship or to the patient/client or others whom disclosure is likely to harm. No confidential communication between a service provider and a patient/client shall be deemed relevant for purposes of this sub-section, except the fact of treatment, the cost of treatment and the ultimate diagnosis unless the party seeking disclosure of the communication clearly establishes in the trial court a compelling need for its production.

(ii) This subsection (e) shall not apply to preclude the assertion of the confidentiality privilege as to confidential information disclosed in the course of any treatment of an abnormal mental or emotional condition

(a) In any action brought or defended under the Divorce Act, or

(b) In any action for damages for pain and suffering that does not include a claim for the treatment of such abnormal mental or emotional condition.

(iii) Confidential information or records may be disclosed in a civil proceeding after the patient/client's death when the patient/client's physical or mental condition has been introduced as an element of a claim or defense by any party claiming or defending through or as a beneficiary of the patient/client, provided the court finds, after *in camera* examination of the evidence, that it is relevant, probative, and otherwise clearly admissible: that other satisfactory evidence, including stipulations of fact between the parties, is not available regarding the fact sought to be established by such evidence: and that disclosure is more important to the interests of substantial justice than protection from any injury which disclosure is likely to cause.

(iv) In the event of a claim made or an action filed by a patient/client, or, following the patient/client's death, by any party claiming as a beneficiary of the patient/client, for injury caused in the course of diagnosis or treatment of said patient/client, the service provider and other persons whose actions are alleged to have been the cause of injury may disclose pertinent confidential information to an attorney or attorneys engaged to render advice about and to provide representation in connection with such matter and to persons working under the supervision of such attorney or attorneys, and may testify as to the said information in any judicial or discovery proceeding for the purpose of preparing and presenting a defense against such claim or action.

(f) *Court-ordered examination.*—Communications made to or diagnoses and opinions made by a service provider in the course of examination ordered by a court for good cause shown may, if otherwise relevant and admissible, be disclosed in a judicial or administrative proceeding in which the patient/client is a party or in appropriate pretrial proceedings, provided such court has found that the patient/client has been as adequately and as effectively as possible informed before submitting to such examination that such communications, diagnoses and opinions would not be considered confidential or privileged. Such communications, diagnoses and opinions shall be admissible only on issues germane to the said proceedings and involving the patient/client's physical or mental condition.

5. Waiver

(a) Particular items of confidential information may be disclosed in judicial proceedings if the court in which the proceedings have been brought finds that the information is relevant and otherwise admissible and that the patient/client or his authorized representative has, without coercion, knowingly waived confidentiality by disclosing, or consenting to disclosure of, the substance of such particular information. In the case of an administrative proceeding, prior to disclosure of confidential information, any dispute as to the issue of waiver of confidentiality shall be referred for determination to the court to which an appeal from the administrative ruling may be taken.

(b) Disclosures that are privileged, disclosures made in the course of obtaining payment for treatment and related services, and disclosures made in the interest of accomplishing a purpose for which the psychotherapist was consulted are not waivers of confidentiality.

(c) For purposes of this section 5, failure by the patient/client or his authorized representative to assert the confidentiality of information in any proceeding in which he has the legal standing and opportunity to do so shall be deemed a consent.

6. Rulings on Claims of Confidentiality

(a) In a ruling on an assertion of confidentiality to prevent disclosure in judicial or administrative proceedings, the court may not require disclosure of information asserted to be confidential under the Act in order to rule on such assertion.

(b) When neither the patient/client nor his authorized representative are parties to an administrative or judicial proceeding or they otherwise lack the opportunity to assert confidentiality, (i) any person asked in administrative or judicial procedeings to disclose confidential information may assert its confidentiality; and, (ii) the presiding officer on his own motion or the motion of any party shall exclude such information. Such presiding officer may not exclude information under this section 6 if, (i) he is otherwise instructed by the client or his authorized representative to permit disclosure; or, (ii) the proponent of the evidence establishes that there is no person authorized to assert confidentiality in existence.

(c) Whenever confidentiality is asserted under this Act in a judicial or administrative proceeding, the party opposing such assertion shall have both the burden of going forward with evidence and the burden of proof with regard to issues of whether confidentiality has been waived and whether any relevant transmissions of information were not made in confidence.

(d) No person shall be held in contempt for failure to disclose confidential information unless he has failed to comply with a court order, a legislative subpoena or an order of an administrative hearing that he disclose such information.

7. Prescriptions

Nothing in this Act shall be construed as limiting or interfering with state and federal regulation and monitoring of the handling and dispensing of prescription drugs; otherwise, however, prescriptions for drugs shall be considered confidential information and subject to the provision of this Act.

8. Research

Persons engaged in research may have access to confidential information that identifies the patient/client where needed for such research, provided no records thereof shall be removed from the service-providing facility that prepared them. Data that do not identify patient/clients or coded data may be removed from a service-providing facility provided the key to such code shall remain on the premises of the facility and no copies thereof are removed. Where the person engaged in research is to have access to confidential information, the research plan first shall be submitted to, and approved by, an appropriate Research Review Committee and by the director of the service-providing facility or his designee. The service-providing facility, together with the person doing the research, shall be responsible for the preservation of the anonymity of the patient/clients and shall not disseminate data that identify a patient/client except as provided by this Act.

9. Mandatory Cautions

(a) All normal disclosures of confidential information shall bear the following statement: "The protection of the confidentiality of information contained herein is required under (chapter) of laws of the State of ( ) which provides for damages and penalties for violations. This material shall not be transmitted to anyone without consent or other authorization as provided in the aforementioned statute." A copy of the pertinent consent form specifying to whom and for what specific use such communication or record is disclosed or transmitted, or a statement setting forth any other statutory authorization for disclosure or transmittal and limitations imposed thereon, shall accompany all such nonoral disclosures. In cases of oral disclosure, the person disclosing confidential information shall inform the recipient that such information is confidential under the laws of this state.

(b) Service providers shall ensure that all persons in their employ or under their supervision are aware of their responsibilities to maintain the confidentiality of information protected by this Act and of the existence of penalties and civil liabilities for violation of this Act.

10. Civil Remedies and Criminal Penalties

(a) Any person aggrieved by a violation of this Act may petition the court of common pleas for the county in which he or the alleged violator resides or in which such violation occurred, for appropriate relief, including temporary and permanent injunctions, and such petition shall be first priority with respect to assignment for trial. Such aggrieved person may also prove a cause of action for general or special damages, or both, and, in cases of willful or grossly negligent violations, punitive damages.

(b) A willful or grossly negligent violation of this Act shall be punishable as a Class C misdemeanor. For purposes of this section, in cases of willful disclosure of confidential information, each such disclosure of information pertaining to any one person shall constitute a separate violation.

11. Employee Discipline

(a) Any state, county or local government employee and any employee of a service-providing facility operated under contract to a state, county or local government or department or agency thereof, who repeatedly, willfully or through gross negligence violates this Act, shall be dismissed from employment, or, in the case of mitigating circumstances deemed adequate by the employer, appropriately disciplined and transferred to a position, if available and otherwise suitable, outside a service-providing facility and involvng no access to confidental information.

(b) Negligent, nonrepetitive violations of this Act shall render such employees subject to appropriate disciplinary action.

(c) In the course of any disciplinary or dismissal actions against such employees, confidential information shall not be used except to the extent necessary to comply with principles of fair notice and hearing, and patient/client identifiers shall be removed from any such information prior to its use in such proceedings.

(d) All contracts between private persons and any state, county or local government or department or agency thereof involving access by such private persons or their employees, representatives, agents or subcontractors shall include a provision setting forth requirements of this section. Failure to include this clause in any such contract shall not limit the operation of this section.

12. Patient/Client Access to Information

(a) Except as provided in (c) and (d) of this section 12, upon request of a patient/client, a service provider shall, within thirty days following the request, allow the patient/client access to his service record.

(b) The service provider shall establish procedures that: (1) allow a person to purchase copies of his record at a reasonable cost, not exceeding the actual cost of duplication to the service provider; (2) allow a person to contest the accuracy, completeness or relevancy of the record content; (3) allow information contained therein to be corrected on request of the person when the service provider concurs in the proposed correction: (4) allow a person who believes that the service provider maintains inaccurate or incomplete information concerning him to add a statement to the record setting forth what he believes to be an

accurate or complete version of those personal data. Such a statement shall become a permanent part of the service provider's personal data system, and shall be disclosed to any individual, agency or organization to which the disputed personal data are disclosed.

(c) If a service provider determines that disclosure to a person of medical psychiatric or psychological data concerning him would be detrimental to that person, or that nondisclosure to a person of personal data concerning him is otherwise required by law, the service provider may refuse to disclose those personal data, and shall refuse disclosure where required by law. In either case, the service provider shall advise that person of his right to appoint another clinician of his own choice as "clinical mediator" to have access to the record. The "clinical mediator" may, upon review of the record, disclose the record to the person, offer to interpret the contents of the record to the person, or may refuse to disclose. If the "clinical mediator" determines against disclosure and the person is unwilling to accept an interpretation of his record, the service provider shall advise the person of his right to seek judicial relief.

(d) If disclosure of personal data is refused by a service provider under this section 12, the person aggrieved thereby may, within 30 days of such refusal, petition the court of common pleas for the county or judicial district in which he resides or in which the service provider resides or practices, for an order requiring the service provider to disclose the personal data. The court, after hearing and an *in camera* review of the personal data in question, shall issue the order requested unless it determines that such disclosure would be detrimental to the person or is otherwise prohibited by law, or may alternatively authorize disclosure to a designated clinician or attorney.

(e) If the person is under 12 years of age, his parent or other custodian shall have the rights set forth in this section 12 on behalf of that person. Further, if the person, in consequence of physical or mental incapacity, shall have been placed under guardianship, his guardian shall have the same rights set forth in this section 12 on behalf of that person.

13. Records and Information Pertaining to Minors

(a) All confidential information pertaining to the provision of health and social services to a minor shall be deemed confidential, and no disclosure of such information shall be made to the child's parent or any other person, except:

(i) If a mior who is twelve (12) years of age or older consents in writing;

(ii) As provided by sections 4 and 12 (c) hereof;

(iii) If the service provider obtains information that he or she believes requires action to prevent serious harm to the minor or another person, he or she may dsclose that information to the child's parent, guardian or legal custodian, or as appropriate under the provisions of the Abused and Neglected Child Reporting Act;

(iv) All records shall be available to the child's counsel of record and professional and paraprofessional persons associated with the child's counsel and to staff members of the Juvenile Court.

14. Personal Notes: Special Limitations on Disclosure

(a) A service provider is not required to but may, to the extent he or she determines it necessary and appropriate, keep personal notes regarding a patient/client wherein he or she may record:

(i) Sensitive information disclosed to him or her in confidence by other persons on condition that such information would never be disclosed to the patient/client or other persons;

(ii) Sensitive information disclosed to him or her by the patient/client that would be injurious to the patient/client's relationships to other persons; and

(iii) The service provider's speculations, impressions, hunches and reminders.

(b) Such personal notes are the work product and personal property of the service provider and shall not be subject to discovery in any judicial administrative or legislative proceeding or any proceeding preliminary thereto.

15. Goup Health and Life Insurance

No person shall demand or request that information as to medical and mental health history, condition and treatment on group health and group life insur-

ance applications, questionnaires and claim forms or any copy thereof or information therefrom, be submitted to an insurance company regarding the insurance coverage of a resident of this state, (a) to or through any member or representative of the group, or (b) to or through the employer or any representative or agent of the employer of the persons covered by such policy, but only directly from the insured or covered persons or their designees and providers of covered health care services or their designees. Insurance companies with group policies covering persons residing in this state and the representatives and agents of such companies, in accordance with rules and regulations to be promulgated by the Director of Insurance, shall, within 120 days from the effective date of this Act (a) take measures to advise group members, employers of group members and representatives and agents of such employers involved in the administration of such policies of the requirements of this section; (b) cause notices regarding this section to be printed prominently on all newly issued or renewal policies, on printed materials intended to be provided to group members and their employers regarding such policies and on all applications, questionnaires, claims and similar forms to be submitted by or on behalf of covered persons and by persons providing covered health care services. For purposes of this section, covered health care services shall include diagnostic and evaluative services. This section shall not apply to applications for life insurance benefit payments.

16. Health and Life Insurance: Prohibition on Requirement of Consent to Disclosure by Insurance Company to Others

No insurance company or any employee, representative or agent thereof shall require of any person residing in this state as a condition of the issuance, continuation, renewal or reinstatement of life, health, accident, medical, hospitalization or similar insurance policy or as a condition of paying any benefits thereunder that an applicant, insured or covered person, or any person acting in his behalf, authorize or agree to authorize such insurance company to disclose or re-disclose confidential information with patient/client identifiers to persons other than itself. Advice that no such requirement may lawfully be imposed must be given in conjunction with any request for such authorization.

17. State, County and Local Information Systems

(a) *Official inspections.*—Nothing in this Act shall be construed as prohibiting any state, county or local government official from performing any audits, investigations or inspections of health or social service facilities in the state as required or authorized by law, *provided* that the performance of such duties shall not entail removal from any such facility of any confidential information with client identifiers or any codes or keys to electronically processed information.

(b) *Statistical reports.*—Nothing in this Act shall be construed as prohibiting the issuance of statistical reports and similar anonymous data regarding the operations of health or social service facilities.

(c) *Electronic data processing.*—

(i) No electronically processed data of confidential information with patient/client identifiers shall be recorded on equipment outside a mental health facility except in accordance with this section.

(ii) Confidential information regarding current patient/clients may be recorded on electronic data-processing equipment outside a mental health facility only if:

1. Such information is encoded by means that make it impossible for persons other than data-processing personnel within such facility to discern the identity of individual patient/clients;

2. The encoding means or devices by which a patient/client can be identified are delivered, within 60 days after a client is discharged or otherwise ceases to participate in diagnosis or treatment, by data-processing personnel within such facility to a person or persons under the direct supervision of the facility director, which person or persons are strictly denied access to the electronic data-processing equipment and are responsible for the safekeeping of such encoding means or devices and the denial of access thereto to all persons except as provided in subsection (iii) of this section 17;

3. The encoding means or devices by which a former patient/client can be identified may be returned to data-processing personnel for purposes of reactivating access to confidential information stored on elec-

tronic data-processing equipment when and only when, (1) the patient/client to which such information pertains has reentered diagnosis or treatment at such facility, or (2) a request for confidential information that may be honored under the provisions of this Act has been received; and

4. No later than 5 years after a patient/client has been discharged or has otherwise ceased to receive services at such facility, or in the case of a minor receiving service that was terminated during his minority, no later than 5 years after attaining his majority, either said encoding means or devices pertaining to such patient/client shall be destroyed, or (2) all electronically processed data pertaining to such patient/client shall be returned to data personnel at such facility. Those facilities planning long-term epidemiological research may request under the research provisions of this statute special informed consent from the patient/client or authorized representative to maintain the patient/client's records for an extended period of time. Treatment may not be denied for failure to consent. The patient/client may at any time cancel consent without prejudice.

(iii) Such encoding means or devices may be disclosed (aa) to the extent necessary for auditors regularly employed by the state to inspect electronic data equipment to ensure strict and complete compliance with this Act, *provided* that such inspections shall not involve the removal of such encoded means and devices, or copies or other reproductions thereof from a mental health facility, (bb) or to the extent required for a fair hearing in connection with the dismissal of an employee charged with violating this Act, and (cc) to the extent necessary for use in a civil or criminal action arising out of violations of this Act.

(d) *Indigency investigations.*—Any agency of state, county or local government charged with responsibility to investigate or audit claims of indigency, hardship or similar status whereby individuals may receive health or social services without charge or on the basis of reduced charges, shall maintain the confidentiality of the patient/clients in the conduct of such investigations or audits and, upon the completition thereof, shall forward a report to the facility or agency for which prepared and shall keep no record of such investigation by which any patient/client can be identified.

18. Disclosures Required in Federally Funded Programs

(a) Confidential information may be disclosed to federal departments and agencies to the extent required under federal law to obtain reimbursement for diagnosis, treatment and other social services under federally funded programs for review and audit that are a requisite for participation in federally funded programs.

(b) Any organization or agency designated under federal law to perform such reviews or audits of the cases of patient/clients who are residents of this state shall maintain the confidentiality of confidential information, shall not disclose confidential information except to the extent required by federal law, and shall destroy the means by which patient/clients can be identified in such information and records containing such information at the earliest opportunity consistent with the requirements of federal law.

(c) To ensure that confidential information regarding citizens and residents of this state is afforded maximum protection consistent with the provisions of this Act, the directors of each state code department delivering health or social services shall promulgate regulations that specify the minimum information required pursuant to subsections (a) and (b) of this section 18 and disclosures in excess thereof shall constitute violations of this Act. In the event a demand for confidential information in excess of that provided for in such regulations is made on any health or social service provider in this state upon pain of disallowance of reimbursement or other benefits, such provider shall immediately refer the matter to the director of the appropriate state code department or his designee, who shall, on behalf of such provider, attempt a resolution of the matter either by negotiation or appropriate court action, or by authorizing said provider to disclose if he determines that disclosure is required by federal law. Disclosures pursuant to the preceding sentence shall not constitute violations of this Act if all reasonable measures to assure confidentiality are taken.

(d) The director of each state code department delivering health or social services shall prepare written notices describing the requirements under any

federally funded programs for the disclosure of confidential information and the purposes for such access: and he shall promulgate regulations establishing procedures whereby each person being provided care or other services for which reimbursement will be sought through a federally funded program involving such disclosure will be given such notice at the outset of the delivery of services. Such notices shall provide advice regarding the individual's option not to receive treatment on a basis whereunder such disclosures are required.

Commentary on Model Law on Confidentiality of Health and Social Service Records

(By Sandra Nye, J.D., M.S.W.)[1]

This Model Act addresses and incorporates three allied legal concepts: confidentiality, privacy, and testimonial privilege. These are highly technical and frequently misunderstood. Privilege is an evidentiary concept which provides an exception to the general principle of law that courts have the right to every man's evidence. The concept has relevance only in context of the testimonial arena. A testimonial privilege (or shield law) permits those protected by it to withhold testimony or records, notwithstanding a subpoena (1). The right to privacy protects the individual from unsolicited, unwarranted intrusion in the conduct and affairs of his life—including the right to keep to himself information about himself (2). The right of a patient/client to confidentiality—and the concomitant duty of the care provider to maintain the patient/client's confidentiality—inheres in the contractural nature of the provider-patient/client relationship. Implied in the contract is a covenant not to disclose (3, 4).

Part of the complexity of this Model Act arises by reason of the legal principles on which it is based and which it intends to alter. In overturning existing law, every detail to be changed must be explicated. Any concept not expressly altered will remain the law. Thus, the Model Act must not only create and articulate novel concepts and procedures but must expressly eliminate or alter existing ones. For example, it is clearly established by case interpretation of statutory or common law privileges that the identity of a patient/client, the fact of the professional relationship, and purely clerical data—such as dates of service delivery—are not privileged communications and are, therefore, not protected from compelled disclosure in a legal proceeding (5). Further, the presence of a third person who is not a party to the provider-patient/client relationship (e.g., a family member or group member) "pollutes" any privilege that might have existed between the provider and the patient/client (6). Such technicalities as these have severely curtailed the efficacy of the communications privilege as a protection to psychiatric patients.

The Model Act is intended to serve as a basis for examining and proposing changes in local legislation. Although it represents the product of a thorough study of this subject and the combined thinking and expertise of many learned professionals, there are doubtless aspects that may be improved. The caveat to be kept in mind in working with the Act is that much of its phraseology consists of "terms of art." A knowledgeable lawyer should be consulted in any redrafting effort. In the limited space available for annotation, it is not possible to provide thorough explication and legal authority. We ask that the reader take on faith, for the time being, that what appear to be redundancy, prolixity, or tortured sentence construction translates in "legalese" as meaningful.

1. *Scope.*—The Act defines both a communications privilege and a general law of confidential information. Thus, in addition to protecting confidential information from compelled disclosure in a judicial, legislative, or administrative proceeding, it also establishes a positive statutory duty on health and social service providers to maintain patient/client confidentiality. A salient principle of the Act is that all patient/client information given for the purpose of health care and social service delivery must be protected—irrespective of the nature of service delivered or the discipline or professional status of the care provider. This is a significant departure from most existing law, which makes irrational distinctions in protecting information as to care setting and care provider cre-

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dentials. The needs of the patient/client for privacy and confidentiality do not differ according to whether the care provider is a social worker, a paraprofessional, or a psychiatrist. It should be public policy to mitigate fear of stigmatization (said to be the greatest barrier to seeking mental health services) so as to encourage individuals to seek necessary health and mental health care and social services.

2. *Definitions.*—Explicit and detailed definitions are required to extend protection to categories of persons and data heretofore excluded by common law principles and certain statutes.

3. *Authorized Disclosures.*—The nature of consent for disclosure is defined and delimited. This section clears up many existing ambiguities and procedural questions and outlines in detail the rights and duties of persons seeking disclosure, of care providers, and of patient/clients.

The minimum age at which consent may be given is established as 12 years. This is consistent with current child development theory recognizing the privacy and confidentiality needs of adolescents receiving mental health treatment and with existing federal and state legislation authorizing persons of this age to consent to certain types of treatment and other services. It is to be noted that parental notification will be automatic in most cases simply by reason of the parent's initiation of or involvement in the service delivered to the minor, or the minor's consent that disclosure be made to his/her parents. In the few cases in which the minor obtains services by reason of legal capacity to do so and does not authorize disclosure to his/her parents, the service provider who deems it necessary to notify the parents in order to protect the minor from serious injury or health hazard has the option under section 4(c) to do so without the minor's consent or over his/her objection.

4. *Disclosures Without Authorization.*—Although the underlying philosophy of the Act is that an individual has the right to control his/her private and confidential information, there is no question but that certain disclosures of such information are not only necessary but appropriate. In recognizing the "need to know," the following principles are essential:

a. Unauthorized disclosures should be kept to a minimum, consistent with the needs of the patient/client and the exigencies of service delivery.

b. The primary duty of the service provider is to the patient/client. There is no *duty* upon a provider to protect third parties but, there may be instances in which the provider deems it in the patient/client's interest to disclose confidential information to protect the patient/client or another from serious harm. This is left to the *sole discretion* of the service provider, who is immunized against liability for any such disclosure in good faith.

The Patient/Client-Litigant Exception (subsection 4(e)) is an almost universal exception to existing privilege laws. The adage that "confidentiality is to be a shield, not a sword" decrees that a patient/client waives any privilege he may have as to material relevant to the trial of a lawsuit in which he is party. This section is based in part on guidelines set forth by Judge Shirley Hufstedtler in her brilliant dissenting opinion in *Caesar* v. *Mountanos* (7). It further excludes from the rubric of "mental condition" an action for pain and suffering per se and incorporates a refinement of Illinois law eleminating the exception in divorce case (8). Strictures are placed on disclosure after the death of the patient/client because the threat of disclosure after death may serve to inhibit communications, particularly in mental health care delivery. This subsection clears up a problem presently existing in some jurisdictions that holds that the privilege expire with its holder.

Court-ordered examination (subsection 4(f)). Service providers are frequently called upon to conduct examinations for trial purposes. Although clinical skills are utilized in such examinations, the information conveyed is intended to be disclosed, and communications made in the course of such examinations are not protected by a privilege. The relationship of examiner to the subject of the examination is not that of service provider and patient/client. Disclosure should, however, be limited in accordance with the purpose for which it is made.

5. *Waiver.*—At common law, a communication not expressly asserted by its holder is deemed waived. This section clarifies the question of waiver and obviates certain "accidental" or "resulting" waivers.

6. *Ruling on Claims of Confidentiality.*—This section protects, to the extent possible, confidential information during a controversy as to its discoverability

or admissibility in a judicial or adminstrative proceeding. The person seeking disclosure has the burden of establishing discoverability or admissibility. The court is empowered to protect confidential information in appropriate cases in which there is no person in existence who is otherwise empowered to do so.

7. *Prescriptions.*—The patient/client's need for confidentiality is balanced by the interest of the community in regulating drugs.

8. *Research.*—Although confidential information disclosed by a patient/client in the course of receiving health and social services is intended by the patient/client to be utilized for his direct benefit in service provision, the value to the community in accessibility of data for research and development cannot be overlooked. This section provides access to data under strictures that will protect the patient/client.

9. *Mandatory Cautions.*—The disseminator of confidential information is charged with the instruction of employees and disclosees as to the protection of the information he/she is disclosing.

10. *Remedies.*—Civil (equitable and legal) relief is authorized for any person aggrieved by violation of this Act. In some jurisdictions violations of confidentiality statutes have been discouraged by criminal sanctions as well. Alternatives are provided herein.

11. *Employee Discipline.*—This section is intended to enable employers to take appropriate action against employees who willfully or by gross negligence violate the Act. Employers are said to fear that, without such provisions, civil service and union procedures will effectively preclude disciplinary action against erring employees who are employed under civil service regulations or union contracts and whose wrongful acts not only injure patient/clients but also expose the employers to liability.

12. *Patient/Client Access to Information.*—As a general principle, it is held that every person should have access to any record information about him. If information is to be disclosed pursuant to consent, such access is probably mandatory. (Consent is not valid unless informed; one cannot give informed consent to disclose unless he/she has knowledge as to the content of the disclosure.) Further, a patient/client should have an opportunity and right to seek correction or at least enter his/her opinion into a record that contains an error or with which he/she disagrees. Experience with allowing patient/client access to records has been positive. At the same time, some clinicians are concerned that there may be occasional instances in which the patient/client will be harmed by such access or the treatment process compromised. A procedure is established that, although possibly cumbersome, will allow access as a general rule and will offer protection in cases in which the service provider deems access to be against the interest of the patient/client.

13. See annotation to Section 3, supra.

14. *Personal Notes.*—This concept has been discussed for a number of years as a device by which clinicians can protect records of certain types of data (9). As the public insistence on patient/client right of access to records has grown, some care providers have been concerned about the effect on the individual who discovers unknown facts about him/herself or others or is exposed to speculations and interpretations of the clinician. Some information—although clinically relevant—may be so "sensitive" as to warrant excluding it from the case record entirely. Notes kept by the care provider for use in research, teaching, or supervision may contain material that is inappropriate for the clinical record. Further, by reason of the nature of mental health treatment, certain record content may be highly prejudicial to the patient/client if disclosure is compelled in a judicial or other proceeding.

The "personal notes" concept borrows from a protection afforded "the work product of the attorney." Certain specific types of material can be recorded in the clinician's "personal notes," which are to be utilized by the clinician for his/her own purposes and may not be disclosed or discovered. Concern has been expressed by some administrators and attorneys that this device will afford lazy, careless, or unscrupulous care providers a means of "hiding their wrongdoings" or, at best, neglecting their recordkeeping. Although it is not possible to preclude wrongdoing on the part of any person who is so inclined, the language of the section is eminently plain and clear as to the limited usage of "personal notes." The value of the device in protecting patients and enhancing service provision is deemed to outweigh any possible misuse potential.

15. *Group Health and Life Insurance.*—Although the insurance industry denies the charge, there is a widespread belief that it is the major perpetrator of privacy and confidentiality offenses. In any case, care providers and patient/clients have expressed outrage over insurance company demands for information. A particular source of concern has been the practice of claims processing through employers. This section establishes parameters for data collection by insurors and requires that information about these parameters be supplied to the insured.

16. *Health and Life Insurance Disclosure of Information.*—Of the several insurance company practices objected to by providers and patient/clients, one of the most decried is the exchange and dissemination of data among insurors. The practice is widespread; the insurors insist they have a need and right to protect themselves. The many documented abuses of this practice lead to the conclusion that it must be curbed. The interests of the individual and the community in encouraging health care—and particularly mental health care—are held to outweigh the financial interest of the insurors.

17. *State, County and Local Information Systems.*—Electronic data collection and storage is perceived as a threat to individual liberty (10). Despite the best intentioned efforts at safeguarding data banks, they are vulnerable to invasion and misuse. Rules for protecting patient/client privacy and confidentiality are established in the light of the realities of audit and accountability requirements.

18. *Disclosures Required in Federally Funded Programs.*—The practical exigencies of federal funding are recognized in this section, with safeguards established for confidential information being disclosed. Notice to the patient/client relative to disclosures and options is required.

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American Medical Association Model State Legislation on Confidentiality of Health Care Information

Set forth below is a summary of a bill for model state legislation on confidentiality of health care information which has been developed by the American Medical Association. This model bill was approved by the AMA House of Delegates in June 1976.

MAJOR PROVISIONS OF MODEL BILL

(1) Place reasonable restrictions upon third parties (someone other than a health care provider or the person to whom confidential health care information relates) with respect to unauthorized access to, use of, and further distribution of confidential health care information ("third party" does not include hospitals in the new draft);

(2) Require written authorization for release of confidential health care information (except in those situations provided for in the bill, including a new exception to permit transfer of information, without the necessity of consent, between insurers and reinsurers);

(3) State basic requirements for an authorization form for release of confidential health care information;

(4) Require establishment by third parties of minimal security procedures for safeguarding confidential health care information after it is acquired;

(5) Require a third party in limited circumstances to forward confidential health care information to a physician designated by the patient for review by that physician and discussion with and disclosure to the patient as appropriate;

(6) Place limitations on the use of compulsory legal process for obtaining confidential health care information;

(7) Establish a privileged communication status;

(8) Establish immunity for members of medical peer review committees and protect proceedings of such committees from discovery while at the same time not limiting the authority, which may otherwise be provided by law, of a physician-licensing or disciplinary authority to acquire information regarding a peer review committee's proceedings or actions;

(9) Provide for penalties for violation of provisions of the bill. (The new draft deletes any reference to punitive civil damages and reduces the criminal penalties contained in the prior draft.)

IN THE GENERAL ASSEMBLY STATE OF ————

A BILL To provide for confidentiality of health care information

Be it enacted by the People of the State of ------, represented in the General Assembly:

Section 1. This Act may be cited as the "Confidentiality Of Health Care Information Act".

Section 2. The purpose of this Act is to establish safeguards for maintaining the integrity of confidential health care information.

Section 3. For purposes of this Act—

(a) the term "health care provider" means any person, corporation, facility or institution licensed by this state to provide or otherwise lawfully providing health care services, including but not limited to a physician, hospital or other health care facility, dentist, nurse, optometrist, podiatrist, physical therapist or psychologist, and an officer, employee or agent of such provider acting in the course and scope of his employment or agency related to or supportive of health care services;

(b) the term "health care services" means acts of diagnosis, treatment, medical evaluation or advice or such other acts as may be permissible under the health care licensing statutes of this state;

(c) the term "confidential health care information" means information relating to a person's health care history, diagnosis, condition, treatment, or evaluation;

(d) the term "medical peer review committee" means a committee of a state or local professional medical society or of a medical staff of a licensed hospital, nursing home or other health care facility provided the medical staff operates pursuant to written bylaws that have been approved by the governing board of the hospital, nursing home, or other health care facility, or other organization of physicians formed pursuant to state or federal law and authorized to evaluate medical and health care services;

(e) the term "third party" means a person or entity other than the person to whom the confidential health care information relates and other than a health care provider.

Section 4. (a) Except as provided in subsection (b) or as otherwise specifically provided by law, a person's confidential health care information shall not be released or transferred without the written consent, on a consent form meeting the requirements of section 4(d) of this Act, of such individual or his authorized representative. A copy of any notice used pursuant to section 4(d); and of any signed consent shall be provided to the person signing a consent form.

(b) No consent for release or transfer of confidential health care information is required in the following situations: (1) to a physician, dentist, or other medical personnel for diagnosis or treatment of such individual in a medical or dental emergency, or (2) to medical peer review committees, or (3) to a State Insurance Department or other state agency for the purpose of reviewing an insurance claim or complaint made to such Department or other agency by an insured or his authorized representative or by a beneficiary or his authorized representative of a deceased insured, or (4) to qualified personnel for the purpose of conducting scientific research, management audits, financial audits, program evaluations, or similar studies, but such personnel shall not identify, directly or indirectly, any individual patient in any report of such research, audit, or evaluation, or otherwise disclose patient identities in any manner

(the term "qualified personnel" means persons whose training and experience are appropriate to the nature and level of the work in which they are engaged and who, when working as part of an organization, are performing such work with published and adequate administrative safeguards against unauthorized disclosures), (5) by a health care provider, as reasonably necessary in the provision of health care services to a person, or in the administration of the office or practice or operation of a health care provider (as used herein, "administration" shall include, but not be limited to, purposes of: accreditation, reimbursement, liability risk management or appraisal, and defense or prosecution of legal actions), (6) by an employer as reasonably necessary in the administration of a group insurance or workmen's compensation plan, (7) upon the filing of a claim for insurance benefits, between third party insurers to determine their relative rights and obligations concerning the individual's entitlement or the amount or kind of insurance benefits, when the policy of insurance obtained by the individual provides for obligations by more than one insurer with respect to a claim for benefits, or (8) between insurers and reinsurers in connection with the underwriting and administration of coverages and the processing of claims.

The release or transfer of confidential medical information under any of the above exceptions shall not be the basis for any legal liability, civil or criminal, nor considered a violation of this Act.

(c) Third parties receiving and retaining an individual's confidential health care information must establish at least the following security procedures: (1) limit authorized access to personally identifiable confidential health care information to persons having a "need to know" such information: additional employees or agents may have access to such information which does not contain information from which an individual can be identified; (2) identify an individual or individuals who have responsibility for maintaining security procedures for confidential health care information; (3) provide a written statement to each employee or agent as to the necessity of maintaining the security of confidential health care information, and of the penalties provided for in this Act for the unauthorized release, use, or disclosures of such information; receipt of such statement shall be acknowledged by such employee or agent signing and returning same to his employer or principal and the employer or principal shall furnish his employee or agent with a copy of the signed statement, and shall retain the original thereof; (4) take no disciplinary or punitive action against any employee or agent who brings evidence of violation of this Act to the attention of any person or entity.

(d) Consent forms for the release or transfer of confidential health care information shall contain, or in the course of an application or claim for insurance be accompanied by a notice containing, at least the following:

(1) the need for and proposed use of such information;

(2) a statement that all information is to be released or indicating the extent of the information to be released, and

(3) a statement that such information will not be given, sold, transferred, or in any way relayed to any other person or entity not specified in the consent form or notice without first obtaining the individual's additional written consent on a form stating the need for the proposed new use of such information or the need for its transfer to another person or entity, and,

(4) a statement that such consent applies only to the release or transfer of confidential health care information existing prior to the date such consent is signed, except that when such consent is given in the course of an application or claim for insurance it shall also apply to medical information existing at any time during the period of contestability provided for in the policy and during periods of ongoing proofs of loss during a claim.

Section 5. (a) Upon occurrence of an action or decision of any third party, which adversely affects a person, and which is based in whole or in part upon his confidential health care information, including, but not limited to, the following actions or decisions: (1) denial of an application for an insurance policy; (2) issuance of an insurance policy with other than standard and uniform restrictions; (3) rejection in whole or in part of any claim for insurance benefits; (4) denial of an employment application or termination of employment when such denial or termination is for health reasons; and upon the written request of such person or his authorized representative (or, if such person is deceased, then his heir or beneficiary or their authorized representative or his estate), a third party shall transfer all of such person's confidential health care information in its possession to a physician designated in such written request.

Prior to making such transfer, a third party may require payment of its actual cost of retrieval, duplication and forwarding of such information.

(b) A physician receiving confidentiai health care information pursuant to (a) above, may review, interpret and disclose any or all of such information to the person at whose request such information was transferred, as said physician deems in his professional judgment to be in the best interests of the person to whom such information relates.

(c) After reviewing his confidential health care information pursuant to this Section, a person or his authorized representative may request the third party to amend or expunge any part he believes is in error, or request the addition of any recent relevant information.

Upon receiving such a request, the third party shall notify the health care provider who initially forwarded such information to the third party, and when such health care provider concurs with such request, the third party shall return such information to that health care provider for modification. Prior to making such return, a third party may require payment of its actual cost of notice, duplication, and return of such information. Except upon court order, the third party shall not itself modify such information. A person after requesting and reviewing his confidential health care information shall have the right, in any case, to place into the file a statement of reasonable length of his view as to the correctness or relevance of existing information or as to the addition of new information. Such statement or copies thereof shall at all times accompany that part of the information in contention.

Section 6. (a) (1) Except as provided in subparagraph (2) hereof, confidential health care information shall not be subject to compulsory legal process in any type of proceeding, including, but not limited to, any civil or criminal case or legislative or administrative proceedings or in any pre-trial or other preliminary proceedings, and a person or his authorized representative has a privilege to refuse to disclose, and to prevent a witness from disclosing, his confidential health care information in any such proceedings.

(2) The exemption from compulsory legal process and the privilege provided in subparagraph (1) above shall not apply when:

(A) an individual introduces his physical or mental condition, including, but not limited to, any allegation of mental anguish, mental suffering or similar condition as an element of his claim or defense, provided that a claim for damages or other relief for "pain and suffering" based solely on one's physical condition does not constitute the introduction of one's mental condition into issue and the exemption and privilege shall apply in such situation as to those portions of one's confidential health care information relating to mental condition.

(B) the individual's physical or mental condition is relevant regarding the execution or witnessing of a will or other document;

(C) the physical or mental condition of a deceased individual is introduced by any party claiming or defending through or as a beneficiary of such individual;

(D) in a civil or criminal commitment proceeding, a physician, in the course of diagnosis, treatment, or medical evaluation of an individual, determines that an individual is in need of care and treatment in a hospital or any other health care facility which is deemed by the individual's physician to be appropriate for mental illness;

(E) a judge finds that an individual, after having been informed that the communications would not be privileged, has made communications to a psychiatrist in the course of a psychiatric examination ordered by the court, provided that such communications shall be admissible only on issues involving the individual's mental condition;

(F) in any court proceeding, including an ex parte hearing, it is demonstrated on a prima facie basis to the court that the individual's physical or mental condition is of an imminent and serious danger to the physical or mental health of another person, or to the security of the United States, or

(G) in any action by an individual pursuant to Section 9 of this Act, or in any policy action brought by an individual against his insurance carrier, or by the carrier against an insured, or in any other action by an individual wherein it is demonstrated to the court that such confidential health care information is relevant and material then such court may issue an order compelling production of such information.

(b) The exceptions contained in items (A) through (G) of subparagraph (2) above are not intended to preclude the exemption or privilege described in subparagraph (1) above in any pretrial or trial proceedings under the Divorce Act of this State unless the individual or witness on his behalf first testifies as to such confidential health care information.

Section 7. (a) Notwithstanding other provisions of this Act, health care providers may make confidential health care information available to medical peer review committees without authorization.

(b) Confidential health care information before a medical peer review committee shall remain strictly confidential, and any person found guilty of the unlawful disclosure of such information shall be subject to the penalties provided in this Act.

(c) Except as otherwise provided in this Section, the proceedings and records of medical peer review committees shall not be subject to discovery or introduction into evidence. No person who was in attendance at a meeting of such committee shall be permitted or required to testify as to any matters presented during the proceedings of such committee or as to any findings, recommendations, evaluations, opinions or other actions of such committee or any members thereof.

Confidential health care information otherwise discoverable or admissible from original sources is not to be construed as immune from discovery or use in any proceeding merely because they were presented during proceedings before such committee, nor is a member of such committee or other person appearing before it to be prevented from testifying as to matters within his knowledge and in accordance with the other provisions of this Act, but the said witness cannot be questioned about his testimony or other proceedings before such committee or about opinions formed by him as a result of said committee hearings.

(d) The provisions of subsection (c) above limiting discovery or testimony do not apply in any legal action brought by a medical peer review committee to restrict or revoke a physician's hospital staff privileges, or his license to practice medicine, or to cases where a member of the medical peer review committee or the legal entity which formed such a committee or within which such committee operates is sued for actions taken by such committee, provided that in any such legal action personally identifiable portions of a person's confidential health care information shall not be used without written authorization of such person or his authorized representative or upon court order.

(e) Nothing in this Act shall limit the authority, which may otherwise be provided by law, of a physician licensing or disciplnary board of this State to require a medical peer review committee to report to it any disciplinary actions or recommendations of such committee, or to transfer to it records of such committee's proceedings or actions, including confidential medical information, or restrict or revoke a physician's license to practice medicine, provided that in any such legal action personally identifiable portions of a person's confidential health care information shall not be used without written authorizaton of such person or his authorized representative or upon court order.

(f) No member of a medical peer review committee nor the legal entity which formed or within which such committee operates nor any person providing information to such cmmittee shall be criminally or civilly liable for the performance of any duty, function, or activity of such committee or based upon providing information to such committee; provided such action is without malice and is based upon a reasonable belief that such action is warranted.

Section 8. (a) Civil Penalties—Anyone who violates provisions of this Act, may be held liable for special and general damages.

(b) Criminal Penalties—Anyone who intentially and knowingly violates provisions of this Act shall, upon conviction, be fined not more than $1,000, or imprisoned for not more than six months, or both.

(c) The civil and criminal penalties above shall also be applicable to anyone who obtains an individual's confidential health care information through the commission of a crime.

Section 9. A person or his authorized representative shall have the right, when there is an unreasonable refusal to change the records as provided in Section 5, to seek through court action the amendment or expungement of any part of his confidential health care information in a third party's possession which he believes is erroneous.

Section 10. Attorney's fees and reasonable costs may be awarded, at the discretion of the court, to the successful party in any action under this Act.

Section 11. Any agreement purporting to waive the provisions of this Act is hereby declared to be against public policy and void.

Section 12. If any provision of this Act is held by a court to be invalid, such invalidity shall not affect the remaining provisions of this Act, and to this end the provisions of this Act are hereby declared severable.

Section 13. This Act shall become effective ——— (one year) from the date of being signed into law.

[From the Psychiatric News, Washington, D.C., February 1, 1980]

COURT STOPS STATE SEIZURE OF RECORDS

In a decision that takes a giant step toward affirming the confidentiality of the psychiatrist-patient relationship, a federal court in Hawaii ruled recently that the state, in seeking to prevent Medicaid fraud, does not need to review the personal clinical material in a patient's file in order to conduct an investigation for fraud. Judge Matthew Byrne of the U.S. District Court for the District of Hawaii declared sections of Hawaii's 1978 Medicaid anti-fraud law unconstitutional and enjoined the state from enforcing the terms of a section that allowed government prosecutors to use administrative search warrants issued under a relaxed probable cause standard to inspect the confidential files of psychiatrists.

In the case, the Hawaii Psychiatric Society, an APA district branch, challenged the constitutionality of the statute as violating the physician's right to protection from unreasonable search and seizure and the patient's Ninth Amendment privacy rights. Judge Byrne ruled that the state's interest in enforcing the Medicaid law would almost never permit a state agency to view a patient's confidential disclosures to his therapists. Byrne wrote, "There is no evidence that review by the state of personal and confidiential information contained in psychiatric patients' files is necessary to prevent fraud. The details of a patient's problems are not necessary to an avaluation of whether a psychiatrist is rendering services and the amount claimed."

Elaborating, Byrne said, "The state has a compelling interest in ensuring that services and supplies for which it is being billed have been provided and that the Medicaid program is not being defrauded. But Section Eight [the search section] is not narrowly drafted to express only those state interests. There has been no showing, and the court does not believe that there could be a showing, that the issuance of warrants to search and seize the therapeutic notes, patient history forms, diagnoses, and other confidential medical records of a psychiatrist, absent even a suspicion that an individual provider has defrauded the state or failed to maintain records, is necessary to serve any of the state interests put forward."

Byrne noted the circumstances under which the state might constitutionally review confidential psychiatric notes. If the state first audited the non-confidential portions of a physician's files—such as information on what treatment was provided, when it was given, and how much the patient was charged—and, based on this initial review, could "determine that a reasonable suspicion existed that a provider was defrauding the state, a warrant to inspect more sensitive records might be available. The court expresses no opinion at this time as to the constitutionality of such a procedure or the standards to be met in seeking such a warrant. Nevertheless, the availability of this and other less intrusive means to achieve the compelling interest served by Section Eight casts considerable doubt on that statute's constitutionality."

The judge added, "The Supreme Court has consistently been concerned with protecting individuals against governmental intrusion into matters affecting the most fundamental personal decisions and relationships. . . . No area could be more deserving of protection than communications between a psychiatrist and his patient. . . . Many courts and commentators have concluded that, because of the uniquely personal nature of mental and emotional therapy, accurate diagnosis and effective treatment require a patient's total willingness to reveal the most intimate personal matters, a willingness that can exist only under conditions of the strictest confidentiality." However, the judge explained, the extension of the privacy right to decisions regarding psychiatric care does not automatically make Hawaii's anti-fraud law unconsitutional. "Psychiatric care," he said, "may be regulated in ways that do not infringe protected individual choices,

and even a burdensome regulation may be validated by a sufficiently compelling state interest." What makes the search section of Hawaii's law invalid is that the provision does not represent "the least restrictive means to achieve a compelling state interest."

TREATMENT INHIBITED

The court agreed with the Hawaii Psychiatric Society's contention that treatment shoudl be inhibited if the psychiatrist operated under the fear that his notes and diagnoses were likely to be reviewed by state officials and that such a likelihood would deter individuals from seeking needed treatment. It would also deter psychiatrists from keeping good records. "The threat of searches," wrote Byrne, "may . . . decrease the likelihood that the very information most valuable to another treating psychiatrist, a history of the patient's emotional and mental problems, will not be available." As the sensitivity of the information increases, added the court, the burden of the state to justify disclosure also increases. The court found that ". . . some showing of an 'individualized, articulable suspicion' should be required before a warrant issues to search or seize a psychiatrist's confidential medical records."

Judge Byrne enjoined the state from enforcing the search clause of the Medicaid anti-fraud statute and ordered all records previously searched and seized to be released. Speaking for the Hawaii Psychiatric Society, Robert Marvit, M.D., said that the group is "elated" with the judge's decision.

The case is *Hawaii Psychiatric Society* v. *Ariyoshi*, No. CV–79–0113, U.S. District Court of Hawaii, October 22, 1979.

[From the San Francisco Chronicle, August 29, 1979]

PATIENT RECORDS—SUIT FILED OVER DRUG CLINIC RAID

(By Maitland Zane)

The American Civil Liberties Union brought suit in Superior Court yesterday to recover patient records seized at a drug clinic at San Francisco General Hospital.

Lawyers for the ACLU said the February 8 raid violated federal and state laws and regulations protecting the confidentiality of patient data.

Six officers of the San Francisco and San Mateo police departments were armed with a blanket search warrant when they arrived at a methadone clinic to follow up a tip that one or more ex-heroin addicts enrolled in a volunteer program might have been involved in a vicious triple-murder that had occurred four days earlier in San Mateo.

The clinic director, Dr. David Deitch, refused to hand over records relating to 35 men enrolled in an experimental, federally-financed program using a new, longer-lasting Methadone known as LAAM. The name is an acronym for the heroin-substitute's chemical components, Levo Alpha Acetyl Methodol.

"What the cops said was 'Either you provide us with what we want or we'll take every piece of paper in the joint,' " said Deitch, 45, who has a Ph.D. in clinical psychology.

A tense situation developed, he said, with the officers accusing Deitch of "try-to put himself above the law."

After about 20 minutes of angry exchanges, San Francisco Narcotics Inspector Marvin Dean put Deitch "under detention" in the psychologist's office and held him for about 90 minutes.

By that time the hospital's acting administrator, Frank Puglisi, decided to honor the search warrant and allowed the officers to copy the names, addresses, dates of birth and photographs of the 35 LAAM patients, some of whom had jobs and families, and have never been in trouble with police.

"It was hairy," Puglisi recalled yesterday. "A very tension-filled situation."

Puglisi, 35, said he temporarily suspended Deitch from duty so that he, Puglisi, could legally assume responsibility for the clinic's records.

"For some time I thought he was going to be arrested," said Puglisi. "But morally and professionally he had to do what he did."

Puglisi said he acted as he did "because I'm not into the martyr business" and because he feared that the records of 180 additional Methadone patients would

have been seized because of the "sweeping" search warrant the officers had with them.

At a news conference yesterday, ACLU lawyer, Neil F. Horton of Oakland, said the lawsuit seeks the return to the clinic of all records seized, as well as the destruction of data which may have been provided to other police departments about the LAAM patients.

Inspector Dean defended the actions of the police yesterday, saying "we acted under cover of a search warrant, and there was a compelling reason above and beyond the protection of 'hypes' (addicts)."

Dean said Deitch was placed under detention on the ground he was "physically resisting and interfering with us."

San Mateo police have cleared the Methadone clinic patients of involvement in the February 4 triple murder, but have refused to return the data until the unsolved case is cleared up.

Meanwhile, the Payless drugstore chain has offered a $35,000 reward for the conviction of the killers of its three employees, Michael Olson, 23 of Fremont, William D. Baumgartner, 17, of San Mateo, and Tracy Anderson, 16, of Foster City.

AMERICAN PSYCHIATRIC ASSOCIATION,
Washington, D.C., May 1, 1980.

Hon. CHARLES MCC. MATHIAS,
358 Russell Senate Office Building,
U.S. Senate, Washington, D.C.

DEAR SENATOR MATHIAS: In response to your comments during the Senate Judiciary Committee March 28 hearing on the implications of *Zurcher* v. *Stanford Daily*, the American Psychiatric Association, and the American Medical Association wish to indicate support for your legislative efforts in response to this issue.

Indeed, we are most grateful for your thoughtful recognition in your introductory remarks of the "Third Party Privacy Act of 1979", (S. 115) of the need to extend protection of all innocent third party records held in privileged relationships.

We concur with your Congressional Record views when you noted: ". . . the American people have every right to believe that warrants cannot be used to search the homes and offices of nonsuspects. They have a right to expect that surprise searches of nonsuspects are the exception, not the norm; and that ordinarily third parties would have an opportunity to press their objective to the Government's request in court."

We deeply appreciate the fact that you support the importance of the confidentiality of the doctor/patient relationship and are grateful for your sensitivity and interest in this matter.

We commend your bill's objective to provide protection to innocent third parties from possible abuse of the search warrant procedure and welcome the opportunity of working with you to achieve the goals articulated in S. 115.

Should you have any further questions, we would be pleased to respond.

With best wishes,

Sincerely,

NANCY C. A. ROESKE, M.D.

QUESTIONS SUBSEQUENTLY SUBMITTED TO FOLLOW THE TESTIMONY OF DR. NANCY C. A. ROESKE

Question. Your testimony stresses the importance of protecting the critical element of the physician/patient confidential relationship. Do any studies support that statement?

Answer. Yes, Mr. Chairman. There is a 1979 study by a Dr. Paul Lane on "The Effects of Complete and Limited Confidentiality on Self-Disclosure." The author carried out a controlled study of 102 college students and concluded: "That limited confidentiality significantly inhibited self-disclosure." We would be happy to submit the study for the record.

Question. Dr. Roeske, do you believe that the Stanford Daily decision has led to the increased use of search warrants?

Answer. Yes. The National Association of District Attorneys so testified on August 28, 1978 before this committee when they stated that there have been. I quote: ". . . a substantial amount of warrants against persons who were not, themselves, suspect of crime." They went on to say "that there have been few instances where subpoenas have been issued to the news media to secure the sources of information. Obviously, there have been innumerable instances of third-party searches."

Question. In the privileged relationship between physician and patient, I am sure that standards of practice seek to protect information imparted in that relationship, as I am sure are stated in ethics codes?

Answer. I would be happy to submit for the record the medical ethics code of the APA and the AMA. As you are aware, Mr. Chairman, all physicians upon receiving license to practice medicine swear the Hippocratic Oath, which in part the doctor states, and I quote that "whatever, in connection with my professional practice, or not in connection with it, I may see or hear in the lives of men which ought not to be spoken abroad I will not divulge, as reckoning that all such should be kept secret."

Question. Dr. Roeske, we all are aware of the rummaging that usually occurs in the execution of serving the search warrant. For sake of argument, let us assume that it does not occur and the police authority goes directly into the particular file of "Patient X". Would you mind sharing with us what information is so confidential in a medical file? Or, to be more specific, could you identify what there could be in a patient's psychiatric record, and the information of an individual contained therein which would be harmful to a third party?

Answer. Examples: sexual assault—parent/child identity crisis for child illegitimate children/foster children—knowledge of parents.

Senator MATHIAS. Our final witness this morning is Richard J. Williams, vice president, National District Attorneys Association. He comes to us today from Chicago.

Mr. Williams, as you heard me say frequently this morning, your statement will appear in full in the record as if you had read every word of it. With the passage of time, we would appreciate your summarizing it.

TESTIMONY OF RICHARD J. WILLIAMS, VICE PRESIDENT, NATIONAL DISTRICT ATTORNEYS ASSOCIATION, AND STEPHEN GOLDBLATT, DISTRICT ATTORNEY, CITY OF PHILADELPHIA

Mr. WILLIAMS. I want to first thank the committee for the opportunity of appearing today to testify and give the views of NDAA, on S. 1790 and other proposals that are under consideration by the Congress.

Very briefly, I would indicate that the National District Attorneys Association is a nonprofit, nonpolitical tax-exempt organization with over 7,000 members.

We represent over 1,500 prosecutors offices, ranging in size from our largest office in Los Angeles, to over 600 offices, representing populations of less than 20,000.

By way of perspective, I think it is important to indicate at the outset that we as prosecutors are mindful of the code of professional responsibility which holds that our primary duty as a lawyer engaged in public prosecution is not to convict, but to see that justice is done.

The safety of our citizens and the integrity of our governmental process requires that prosecutors' offices have the ability and the desire to investigate and ascertain facts in a fair, thorough, and expeditious manner, and to make decisions based on the results of such investigations, whether or not to initiate criminal charges. And in fact, if

charges are brought, to then bring to light all relevant information, favorable or unfavorable, so that the criminal trial becomes a process of the search for truth.

We as prosecutors strongly believe in the importance of a free and independent press. We do not view our relationship with the press as an adversarial one. Our adversaries are those who would tear at the fabric of our society through the commission of crimes, not reporters, not editors, not publishers, not psychiatrists. Our opposition to S. 1790 and similar bills should not then be taken as opposition to the fundamental need for a free press.

Rather, it must be understood in the context of support for what we believe are time-honored constitutional values as interpreted by the U.S. Supreme Court which will maintain the criminal justice process as a search for truth.

In commenting on S. 1790, I would like to address first of all, if I might, title III, because the comments that I have with regard to that are broad in nature and will cover many of the other titles of the bill. I would then specifically deal with titles II and I, to indicate more specific problems that we have with those sections.

Proposals to limit the use of search warrants against nontarget third parties are based on two assumptions: One, that investigation can effectively proceed, through making use of alternative legal resources such as the subpena duces tecum, and two, that whatever delay may be caused by resort to such other resources will not impede the investigation.

We believe that these assumptions are erroneous.

In many local jurisdictions the use of a grand jury and a subpena duces tecum is legally unavailable. Even where a subpena duces tecum is available, resort to such will unquestionably cause delay in an investigation.

There are over 900 prosecutors offices in the National District Attorneys Association, representing populations of less than 50,000. In these jurisdictions, grand juries sometimes meet as seldom as once or twice a month. There can be substantial delay in the mere issuance of a subpena, and in addition, the use of the subpena duces tecum requires time to respond, as well as time needed to resolve challenges and appeals to trial and appellate courts.

Even after all appeals are exhausted, the person possessing the evidence may still choose not to deliver the evidence, and to instead subject himself to contempt sanctions. The use of the subpena duces tecum can never guarantee that the evidence will ultimately be available for whatever clarity it may shed on the criminal transaction under investigation.

Even when the evidence is ultimately obtained by the prosecutor, the delay in obtaining the evidence may have ultimately destroyed its usefulness. When an item of critical evidence is obtained quickly, it may often provide leads and clues which are required for the progress of an investigation to either inculpate or exculpate a particular individual.

Early leads and clues to possible witnesses and to other items of physical evidence are essential to the search for truth. Where such do not occur, the prosecutor faces the risk of loss or destruction of

the physical evidence, as well as the hazards of fading memories and intimidation or corruption of witnesses.

I would emphasize that our adversarial system is a memory system. Our system of trials is memory dependent and memory fades with age.

Substantial problems can also be caused by reason of the fundamental difference between a search warrant and a subpena duces tecum. A search warrant is directed against a place, while a subpena is directed to a person. A law enforcement officer may know the location of critical evidence, but may not know the identity of the person who is in possession of the evidence. Or where he does know such identity, if the person to whom a subpena is directed is not present within the jurisdiction, service of the subpena and compelling production of evidence may be difficult or impossible.

In addition to the potentially fatal problems of delay there is always, of course, the serious danger of the risk of destruction or loss of the evidence. Proposals to limit search warrants do not take into account the possibility that the person to whom the subpena is directed may be a friend, relative, or associate of the person under investigation. When such occurs, commonsense says there is a strong likelihood that the person would be motivated to destroy the evidence, or if not to destroy it, at least to put the defendant or the target on notice, and to thereby facilitate its destruction.

In addition to the potential destruction of that evidence, perhaps even more significant, such notice can also lead to the destruction of derivative evidence that would come from the evidence under consideration. Even when the person in possession of the evidence is not a sympathetic party to the criminal target, the security of that evidence in that person's hands will be uncertain and the risk of its ultimate destruction still great. And under some circumstances, the security of the individual possessing the evidence could be jeopardized.

These reasons then generally indicate why prosecutors, through NDAA, oppose proposals to place such limitations upon the use of search warrants against all third parties.

With regard to title II, of S. 1790, the confidential information section, this would restrict search warrant access to documentary evidence in the possession of professionals privileged under the particular law of the particular State.

We oppose the legislation in this area as well. A major effort of both the National District Attorneys Association and the Department of Justice during this decade has been devoted toward developing law enforcement capabilities to investigate and prosecute economic, white collar, and organized crime.

Initiatives in the prosecution of program fraud involving medicare and medicaid have been developed. While not claiming expertise on all types of economic crime, my experience has been that the professional, at least in the professional's role as a business person, has indicated he has not been exempt from criminal activities. Watergate probably should have diminished any myths we held about lawyers, and involvement in criminal activity.

I can tell you from my experience in Atlantic City that not often do you find the lawyer engaged solely in the practice of law, but lawyers are also involved in many activities outside the practice of law run from

their law office. That can include speculation in real estate and include involvement in casinos, it can involve a whole panoply of involvement run out of a lawyer's office that does not involve the actual practice of law.

With regard to title I, that and title IV of S. 1790 are nearly identical to the bill submitted on behalf of the administration.

We feel that this legislation goes considerably beyond the protection of the legitimate press for use of terminology which is broad and imprecise. Requiring a law enforcement official to determine whether information possessed by a person is in connection with a purpose to disseminate to the public a public communication, places an impossible burden on investigating law enforcement officials.

Whether evidence is subject to the protections of this statute depends not so much as objective circumstances, as it does on the state of the mind of the person possessing the evidence.

Thus, before a law enforcement official may execute any third party search warrant, this legislation in effect requires that he know the identity of the possessor of the evidence and the intent and the purpose for which the person possesses the evidence.

As a practical matter, ascertaining such facts in the early stages of an investigation may be impossible. If the purpose of the legislation is to protect the press, then it would be preferable to develop such legislation and limit it to representatives of the press, rather than using what we feel is a vague and overbroad term "work product."

While a precise definition of the press may cause some difficulties, such would not be nearly as great as the difficulties caused by reason of the breadth and imprecision of the term "work product."

By limiting such legislation to the press, law enforcement officials would at least have some reasonably objective standard upon which they could govern the conduct of their investigation.

A determination as to whether evidence is possessed by a representative of the press, is one which in most instances can be made in advance of the search.

A determination as to whether material is possessed as work product is a determination in many instances, which cannot be made until after the search and the resulting litigation.

Use of the concept "work product" therefore may actually not provide more protection, but may actually provide less protection for the press than would be the case if this legislation contained a limitation specifically oriented to the press.

There are various States which have adopted such legislation, even with the difficulties of defining the term "press."

Difficulties with the concept of "work product" may also be understood when one considers the situation where investigating officers are lawfully upon the premises of one possessing work product, looking for other evidence, pursuant to a valid search warrant, and that would still be allowed under S. 1790.

The decision which must be made by the officer as to whether the evidence he may lawfully seize, and which evidence he may not seize, is one which may be difficult if not impossible, and one which certainly places him at his peril with the sanction provisions of this legislation considered.

We believe there are other serious difficulties with the section dealing with work product. The section provides for no protection where there is reason to believe that use of a subpena would result in the destruction, alteration or concealment of materials.

We see no reason to legitimate the destruction of evidence.

In addition, should a person choose not to honor a subpena duces tecum for work product, the only remedy would be by way of contempt. There would be no assurance that the evidence would ever be obtained by law enforcement officials for whatever clarity it might lend to the criminal process.

To illustrate the difficulties raised by these two serious omissions, one only need consider the situation which could have arisen had the Watergate tapes been placed in the custody of someone who was unconnected with any criminal offenses, but who had the loyalty and persuasion of a person like G. Gordon Liddy. There never would have been any way that those tapes would have seen the light of day if this legislation had prevailed.

In summary, elimination of the work product concept and objective clarification of the coverage of the act, would eliminate most of the difficulty and practical application of this particular title of the legislation.

Finally, and briefly, with regard to title IV, dealing with sanctions, here the remedies are unclear. While the section provides for sanctions, it is unclear against whom such sanctions should be applied.

Where a search warrant is obtained and executed in violations of the provisions of this legislation, who is to be the subject of the sanctions? Is it the affiant upon whose testimony the warrant is based? Is it the neutral judge who issued the warrant? Is it the officer or officers pursuant to a judicial order, who execute the warrant?

Furthermore, which governmental body is the subject of sanctions when the affiant of the warrant is an officer of a municipal government, when the judge is a representative of a State government and when the officers executing the warrant are representatives of county government.

We believe that this section needs some clarification.

I have tried in my testimony today to touch upon some of the practical working problems that prosecutors would experience with this legislation.

The problems I indicated are not exhaustive. They are subject to the limits of my law enforcement knowledge and experience.

Of paramount importance, however, I think is to note that without the passage of this or similar legislation problems among prosecutors and the press have been extremely infrequent in occurrence.

In fact, a study done by the Reporters Committee for Freedom of the Press indicated only 14 searches of newspaper offices, most being what we have called polite searches by the Federal Government, in connection with the *Patty Hearst* case. So that the number of searches have been minimal, and since the *Zurcher* decision, no newspaper offices of which I am aware have been searched.

Our society has much to gain through a healthy, arm's-length spirit of cooperation between representatives of prosecution and the fourth estate, and in actual fact, examples of such voluntary cooperation be-

tween prosecutors and the press occur every day by the hundreds, throughout this country.

What we must resist are calls to the barricades which would destroy what we perceive to be a current healthy relationship by pushing prosecutors and the media or other professionals into extreme positions of confrontation with one another.

We should not lose sight of the fact that *Zurcher* represents exactly such an extreme position. Prosecutors have seldom sought search warrants for newspaper offices. The avowed position of the Stanford Daily, of destroying evidence, is clearly not representative of the free press in our country today.

We, as prosecutors, do not believe the necessity for S. 1790 or similar legislation.

We do not believe that such legislation, which would seriously affect the daily operations of our criminal justice system and the search for truth, should be based on the extreme circumstances of the case like *Zurcher*.

Above all, however, we believe that what may be most important is to avoid legislative action which forces prosecutors and professionals to take extreme positions, thereby destroying, rather than enhancing what is currently a healthy and productive relationship in most of our society.

In this regard, we ask for your thoughtful consideration and express our appreciation for the opportunity to appear before you and express our views.

Thank you.

Senator MATHIAS. Well, thank you very much, Mr. Williams. The committee is very grateful to the National District Attorneys Association for the statement which you presented on their behalf.

Let me say that the committee is also reassured by the personal appearance of yourself and Mr. Goldblatt, because now we know that notwithstanding the arrival of the casinos in Atlantic City and the departure of Mayor Rizzo, from Philadelphia, that the public prosecutors are not so overwhelmed by unremitting toil and the ceaseless operation of the courts that they can afford a little time to deal with broader public issues. That is reassuring.

Let me ask you this question. Let us suppose that the mere evidence rule were still in effect at the time that *Stanford Daily* has been decided.

What do you think the results would have been?

Mr. WILLIAMS. As I understand in *Stanford Daily*, they were not looking for the fruits or instrumentalities of a crime. If we still had the mere evidence rule in effect at that time, it may very well have brought about a different decision.

Senator MATHIAS. The warrant may not have been issued.

Mr. WILLIAMS. Had in fact—that of course, was not the law at the time, but that is correct.

Senator MATHIAS. The material sought was not contraband, wasn't the fruit of crime or the instrumentality of crime, the probability is that the warrant wouldn't have issued.

Mr. WILLIAMS. I would agree with you.

Senator MATHIAS. We thank you very much for being here and helping us to make a complete, thoughtful record, on a very troubling subject.

Mr. WILLIAMS. Thank you.

Mr. GOLDBLATT. Thank you.

Senator MATHIAS. Thank you.

This hearing is adjourned, subject to the call of the Chair.

[Whereupon, at 12:25 p.m., the hearing was adjourned, subject to the call of the Chair.]

PREPARED STATEMENT OF RICHARD J. WILLIAMS

Mr. Chairman, members of the committee, my name is Richard J. Williams. I am the County Prosecutor for Atlantic County, New Jersey and Vice President of the National District Attorneys Association on whose behalf I appear here today. I wish to thank you for the opportunity of appearing before you to express the views of NDAA on S. 1790 and similar proposals under consideration by the Congress.

I. BACKGROUND

The National District Attorneys Association is a non-profit, non-political tax exempt organization with over 7,000 members. NDAA is the largest association of prosecuting officials in the United States. Its members include Prosecutors in all of the fifty states representing over 1500 Prosecutor's offices ranging in size from the largest office in Los Angeles and Chicago to over six hundred offices representing populations of less than 20,000.

As prosecutors, we are mindful of the mandate of the Code of Professional Responsibility which holds that the primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done.[1] The safety of our citizens and the integrity of our governmental process require prosecutor's offices which have the desire and ability to investigate and ascertain facts in a fair, thorough and expeditious manner, to make decisions based on the results of such investigation whether to initiate criminal charges, and where charges are brought, to bring to light all relevant information so the criminal trial process becomes a search for truth which will yield a just result. Because of this concern, NDAA respectfully opposes S. 1790 and other pending bills of a similar nature which would limit the traditional well-established authority of federal as well as state and local prosecutors, under our Constitution, in the investigation and prosecution of criminal offenses.

II. ZURCHER V. THE STANFORD DAILY

S. 1790 and similar pending bills were generated by the decision of the United States Supreme Court in *Zurcher* v. *The Stanford Daily*, 436 U.S. 547, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978) in which the United States Supreme Court restated a long standing principle of Constitutional law in the area of search and seizure: a search warrant should only issue upon a showing of probable cause, before an impartial magistrate or judge, that the items which are sought are contraband, evidence of a crime, or the fruits or instrumentalities of a crime and are located in a particular place at a particular time. The issue of whether or not the owner or possessor of the premises is or is not a suspect with regard to the crime had never been considered a determining factor in whether a search warrant should issue. The Supreme Court, in restating accepted Constitutional law, held that a state was not prevented by the Fourth and Fourteenth Amendments from issuing warrants to search for evidence simply because the owner or possessor of the place to be searched was not reasonably suspected of criminal involvement. Because the offices of a newspaper were involved in *Zurcher*, the Supreme Court considered competing claims under the First, Fourth and Fourteenth Amendments. The Court recognized that issuance of a search warrant is not a mere ministerial act but rather an objective decision made by a judicial

[1] ABA Code of Professional Responsibility, EC 7–13 (1969). See also ABA Canon 5, ABA Opinion 150 (1936), and *Berger* v. *United States*, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed.2d 1314 (1935).

officer requiring substantial pre-conditions, including probable cause and specificity with regard to the time and place to be searched and the items to be seized.[2] In reaching its decision, the Supreme Court weighed the competing claims and chose that course which would allow law enforcement authorities to conduct a full and fair investigation to ascertain the truth.

We, as prosecutors, recognize the importance of the values embodied in the First Amendment as well as those of the Fourth. We suggest that prosecutors have traditionally exercised restraint in order to avoid creating situations of confrontation between these values. Neither the interests of a free press nor those of effective prosecution are furthered by forcing such confrontations through pushing matters to the extreme.[3]

Based on informal surveys conducted by the NDAA as well as material compiled by the Reporters Committee for the Freedom of the Press, the restraint shown by prosecutors is clearly demonstrated. Since the issuance of the *Zurcher* opinion, several states, including my own, New Jersey, have recognized the delicate balancing of interests in this area and have adopted policies designed to avoid unnecessary confrontation between prosecutors and the press. New Jersey has adopted legislation with the support of the prosecutors.[4]

Other States have passed "press" legislation, while others have considered it.[5] Others have voluntarily established administrative policies or informal guidelines to cover this situation.

We, as prosecutors, strongly believe in the importance of a free and independent press. We do not view our relationship with the press as an adversarial one. Our adversaries are those who tear at the fabric of society through the commission of crimes, not reporters, editors and publishers. Our opposition to S. 1790 and similar bills should not be taken as opposition to the fundamental need for a free press. Rather, it must be understood in the context of support for time-honored Constitutional values, as interpreted by the United States Supreme Court, which will maintain the criminal justice process as a search for truth and justice.

III. THIRD PARTY SEARCHES

The concept of placing federal preemptive legislative limitations on third party searches by both federal and local prosecutors is a dangerous one which will have serious effects on reasonable law enforcement activities in the area of investigation and prosecution. For that reason, I will discuss in some detail a few of the basic objections which NDAA has to Title III of S. 1790.

Proposals to limit the use of search warrants against non-target third parties are based on the assumptions that: (1) investigation can effectively proceed making use of alternative legal resources such as the subpoena duces tecum and; (2) whatever delay that may be caused by resort to such other resources will not impede the investigation. These assumptions are erroneous.

Prosecutors traditionally have resorted to use of investigative tools other than the search warrant where such resort would not unnecessarily delay or compromise an investigation. The practice cannot be followed in every instance, however, and the fact that prosecutors have generally exercised restraint where possible should not justify the extreme action of restricting the use of such warrants where restraint is not possible.

In many local jurisdictions, the use of a grand jury and a subpoena duces tecum is legally unavailable. Even where a subpoena duces tecum is available, resort to such will unquestionably cause deay in an investigation. There are over 900 Prosecutor's offices in the NDAA representing populations of less than 50,000. In these jurisdictions grand juries sometimes meet as seldom as once or twice a month. There can be substantial delay in the mere issuance of a subpoena. In addition, use of a subpoena duces tecum requires time to respond as well as time

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[2] These standards are usually significantly higher than those required for the issuance of a subpoena duces tecum.

[3] A fact frequently omitted from commentaries about the *Zurcher* case is that The Stanford Daily had expressed a policy, both orally and in writing, that it would destroy any evidence that might aid in the prosecution of war protesters. Joint App. *Zurcher* v. *The Stanford Daily*, pp. 117–118, 149–154.

[4] Public Law 1979, c.488.

[5] The following states have passed "press"-type *Zurcher* legislation: California, Connecticut, Illinois, Nebraska, New Jersey, Oregon, and Texas. Copies of these statutes have been provided to the Committee. These states have considered "press"-type legislation: Arizona, Maine, Massachusetts, Minnesota, Nevada, New York, Ohio, North Carolina (resolution to study the issue), Pennsylvania, Vermont, Washington and West Virginia.

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needed to resolve challenges and appeals in the trial in appellate courts.[6] Even after all appeals are exhausted, the person possessing the evidence may still choose not to deliver the evidence but instead to subject himself to contempt sanctions.

The use of subpoena duces tecum can never guarantee that the evidence will ultimately be available for whatever clarity it may shed on the criminal transaction under investigation and even when the evidence is ultimately obtained by the prosecutor, the delay in obtaining such may have destroyed its usefulness. When an item of ceritical evidence is obtained quickly, it may often provide leads and clues which are required for the progress of the investigation. Early leads and clues to possible witnesses and to other items of physical evidence are essential to the search for truth. Where such do not occur, the prosecutor faces the risk of loss or destruction of the physical evidence as well as the hazards of fading memories and intimidation or corruption of witnesses. The loss of time in the investigative and prosecutive function causes more than mere inconvenience. It can also cause substantial injustice. As stated by Dean Ernest Friesen, an acknowledged expert on delay in our judicial process:

"If we accept the premise that the primary function of court systems is the orderly processing of conflicts presented for resolution, time is a critical factor. The adversary system is a memory dependent system and memory diminishes with time. In a highly mobile society, witnesses are lost and exhibits deteriorate resulting in the loss of such truth as may at one time have been available. Prompt trials of the issue of fact are essential to justice. In the absence of a prompt trial, the courts mock the concept of justice." [7]

Substantial problems may also be caused by reason of a fundamental difference between a search warrant and a subpoena duces tecum. A search warrant is directed against a place, while a subpoena is directed to a person. A law enforcement officer may know the location of critical evidence but may not know the identity of the person who is in possession of the evidence. Or, where he does know such identity, if the person to whom the subpoena is directed is not present within the local or state jurisdiction, service of the subpoena and compelling the production of evidence may be difficult or even impossible.

In addition to the potentially fatal problems of delay there is also serious danger of the risk of destruction or loss of evidence. Proposals to limit search warrants do not take into account the possibility that the person to whom the subpoena is directed may be a friend, relative or associate of the person under investigation. Where such occurs, common sense says there is a strong likelihood that such person would be motivated to destroy the evidence or at least put the defendant on notice and thereby facilitate its destruction. In addition to possible destruction of the subpoenaed evidence itself, such notice can also result in destruction of related evidence to which the subpoenaed evidence would lead. Even where the person in possession of the evidence is not a sympathetic party to the criminal target, the security of the evidence in that person's hands will be uncertain and the risk of its ultimate destruction still great.

As stated by the Supreme Court "it is likely that the real culprit will have access to the property, and the delay involved in employing the subpoena . . . could easily result in the disappearance of the evidence, whatever the good faith of the third party." [8] Further, resort to the subpoena does not ensure that even where some evidence is produced that the evidence will be complete or that where statements are made that the person does not possess the evidence that in fact such statments can be verified.

The assumption that law enforcement officials can accomplish with the subpoena the same things which can be accomplished with a search warrant is erroneous in another respect. A person served with a subpoena may be entitled to defeat the subpoena on a self-incrimination claim. Use of a search warrant, however, does not require the person served to take potentially incriminating actions and his rights are therefore not violated. The ability of a prosecutor to cut through even a spurious objection to a subpoena is minimal as the Supreme Court recognized in *Zurcher* where it observed that, "the burden of overcoming an assertion

[6] Severe conflicts may be anticipated between state "speedy trial" requirements and the challenges of third parties to production of materials under subpoena unless indictments are delayed until after the evidence is acquired.

[7] Friesen, Arrest to Trial in Forty-Five Days: A Report on a Study of Delay in Metropolitan Courts During 1977–78 (LEAA Grant Study, Whittier College of Law, 1979).

[8] *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 561.

of Fifth Amendment privilege, even if prompted by a desire not to cooperate rather than any real fear of self-incrimination, is one which prosecutors would rarely be able to meet in the early stages of an investigation despite the fact that they did not regard the witness as suspect. Even the time spent litigating such matters could seriously impede criminal investigations." [9]

The difficulty of distinguishing between suspects and non-suspects in early stages of an investigation is a further complication of an already difficult situation. The very purpose for conducting the search pursuant to a judicially issued warrant may be for obtaining evidence which will lead to identification of the criminal suspect.

The aforesaid reasons indicate why this nation's prosecutors through the NDAA strongly oppose proposals to place unworkable and unnecessary limitations upon the use of search warrants against third parties.

IV. PRIVILEGED PROFESSIONALS

Title II of S. 1790, entitled "Confidential Information," would restrict search warrant access to documentary evidence in the possession of professionals privileged under the law of a federal or state jurisdiction. This title raises difficulties for prosecutors which are similar to those attendant to searches upon the offices of the press. However, one significant difference between those professional relationships which frequently have a common law "privileged" status [10] under state law and that of the press is that the press is ethically required to search for and to report the truth to the public while the privileged relationships often involve, or even mandate, the preservation of confidentiality of information related on a private basis.[11]

Contrary to the speculation of a few writers on the *Zurcher* case, prosecutors have continued to respect the sanctity of the offices of lawyers, psychiatrists and the clergy and the confidentiality of those relationships in near unanimity.[12]

Factors in addition to prosecutorial restraint operate in this situation. Many prosecutors were defense counsel at one time in their careers and all were trained in an adversarial system which protects the confidentiality of private professional relationships. Few prosecutors wish to offend their local bar association or medical society by a search of the office of a member professional. The press may be expected to bring a search of the office of a professional to the attention of the public and thus render a prosecutor subject to further public accountability.

A prosecutor is also accountable to the courts for proposed and executed searches on the office of a privileged professional. It has been suggested that the requirement of proving probable cause before a neutral magistrate, is in reality, a *pro forma* requirement. The experience of many of our prosecutors has been to the contrary. Even if a warrant is isued on an improper basis, the prosecutor is again accountable before the court on a pre-trial motion or at trial.

Despite these disincentives discouraging a prosecutor from undertaking a search upon the office of a professional, and the extremely unusual occurrence of a situation which would warrant such a search, NDAA is strongly opposed to federal legislation preempting state criminal procedure in this area. A major effort of both NDAA and the Department of Justice during this decade had been devoted towards developing law enforcement capability to investigate and prosecute economic, "white-collar" and organized crime. Initiatives in the prosecution of "program fraud" involving Medicare and Medicaid abuse have also been developed. While I am not an expert on all types of economic crime, my experience has been that the professional, at least in the role as a businessman or businesswoman, has not been exempt from involvement in criminal activity. The recent experience of Watergate had diminished the myth of the law abiding lawyer for our time.

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[9] 436 U.S. 547, 561–62 n.8.

[10] The privileged relationships vary on a state-by-state basis but frequently include the doctor-patient, attorney-client, and priest-penitent relationship.

[11] See, e.g. ABA Code of Professional Responsibility, Canon 4.

[12] In early February 1980, the House Judiciary Subcommittee on the Courts, Civil Liberties and the Administration of Justice requested certain civil liberties groups to provide the Subcommittee with evidence that they had gathered regarding searches on the offices of lawyers and psychiatrists. The American Civil Liberties Union provided the Subcommittee with only six copies of such searches. A newspaper report which had alleged numerous searches on lawyer's offices to have taken place immediately following the *Zurcher* decision proved to be unfounded.

NDAA submits that it would be inappropriate for Congress to carve out special rules for any set of citizens by profession. The notion that any class of citizen should have a privileged protection beyond the Fourth Amendment or that the office of any professional should be a sanctuary for evidence subject to special rules is one which NDAA successfully fought in its amicus brief in the *Zurcher* case. It continues to adhere to that position in its testimony today.

V. THE ADEQUACY OF STATE REMEDIES

During its deliberations on the advisability of federal preemption of state criminal justice procedures in the area of third party searches and in addition to analyzing the need for such legislation, Congress should examine the response of the states to perceived or potential abuse of third party warrants.

While seven states have enacted "press"-type *Zurcher* legislation, at least twelve other states have considered or are in the process of considering such legislation.[13] Only one state, Wisconsin, has enacted an all third party bill. Last year California enacted legislation which provides for controlled search under special procedures to be utilized in searches upon the offices of lawyers, physicians, psychiatrists, or clergymen.

State courts have also construed state third party search warrant law in cases of searches on lawyers' office. The Minnesoa Supreme Cour, relying upon at provision of their state constitution and after consideration of the availability of the *subpoena duces tecum* in the state, held that an attorney's office may not be searched unless the attorney is suspected of criminal wrongdoing or there is a threat that the documents will be destroyed.[14]

Local prosecutors have also developed guidelines for their offices to use in determining whether the use of a search warrant is appropriate when less intrusive means of investigative acquisition are available. The National District Attorneys Association favor the implementation of such guidelines.[15]

In virtually every reported case of searches on the offices of lawyers or on the press, state law has already been revised to meet the concern. Those state remedies have been tailored to meet the specific needs of the criminal justice system of the particular state.[16] Rather than proving the need for federal legislation, the response of the states to searches upon the press and on the office of lawyers and psychiatrists suggests that federal abstention rather than federal preemption is the appropriate path for Congress to take on third party earch warrant legislation.

NDAA requests that the Judiciary Committee seriously consider whether the actual threat to individual privacy manifested by third party searches mandates rejecting the values of federalism for a federal statutory intervention into the criminal procedure of the states. If the Committee chooses to report out Title I of S. 1790 relating to "First Amendment" concerns, it should consider whether federal preemption is necessary in those states where "press"-type legislation, adopted to the particular needs of the criminal justice system of the state, has already been enacted. In those situations, an "indirect" preemption, to preempt only where there is no applicable state law on the issue, would be more appropriate.

VI. ANALYSIS OF SPECIFIC PROVISIONS OF S. 1790 AS REPORTED

A. Title I

Title I and IV of S. 1790 are nearly identical to S. 855 submitted on behalf of the Administration. This legislation goes considerably beyond protection of the legitimate press through the use of terminology which is admittedly broad and imprecise.

Use of the concepts of "work product" and "materials possessed by a person in connection with a purpose to disseminate to the public a public communication"

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[13] A.B. 1609 (1979). Under the California procedure, special masters conduct what could be termed "a polite search" in which the master goes to the office of the professional and asks for the materials specified in the warrant. If the professional claims that the material is privileged, then it is sealed and delivered to the court for a hearing similar to one involved when a party attempts to quash a subpoena.

[14] *O'Connor* v. *Johnson*, ——— Minn. ———, ——— N.W.2d ——— (1979).

[15] This resolution was adopted at a meeting of the Board of Directors at Hershey, Pa., in July, 1978.

[16] Only a state itself should make the determination of whether a "subpoena-first" rule is practical or appropriate for that state.

places an impossible burden on investigating law enforcement officials. Whether evidence is subject to the protections of this statute depends not so much on objective circumstances as it does upon the state of mind of the person possessing the evidence. Thus, before a law enforcement official may execute any third party search warrant, this legislation, in effect, requires that he know the identity of the possessor of the evidence and the intent and the purpose for which the person possesses the evidence. As a practical matter, ascertaining such facts in the early stages of an investigation may be impossible.

If the purpose of the legislation is to protect the press, then it would be preferable to limit such legislation to representatives of the press rather than using the vague and overbroad concept of "work product." While a precise definition of the press may cause some difficulties,[17] such would not be nearly as great as the difficulties caused by reason of the breadth and imprecision in the use of the term "work product." By limiting such legislation to the press, law enforcement officials (especially the sheriffs and policemen who would be serving the warrants) would at least have some reasonably objective standard upon which they could govern the conduct of their investigation. A determination as to whether evidence is possessed by a representative of the press is one which can in most instances be made in advance of the search. A determination as to whether materials are possesed as "work product" is a determination which in many instances cannot be made until after a search and the resulting litigation in court. Use of the concept "work product" therefore not only causes law enforcement officials difficulty but may actually provide less protection for the press than would be the case were this legislation to contain a limitation specifically oriented to the press.

Difficulties with the concept of "work product" may also be understood when one considers the situation where investigating officers are lawfully upon the premises of one possessing "work product," looking for other evidence pursuant to a valid search warrant. The decision which must be made by the officer as to which evidence he may lawfully seize and which evidence he may not seize is one which may be difficult if not impossible and one which certainly places him at his peril when the sanction provisions of this legislation are considered.

We believe that there are other serious deficiencies with the section dealing with work product. The section provides for no protection where there is reason to believe that use of a subpoena would result in the destruction, alteration or concealment of the materials. We see no reason to legitimate the destruction of evidence. In addition, should a person choose not to honor a subpoena duces tecum for "work product" the only remedy would be by way of contempt. There would be no assurance that the evidence could ever be obtained by law enforcement officials. To illustrate the difficulties raised by these two serious omissions, one need only to consider the situation which could have arisen had the White House Watergate tapes been placed in the custody of someone who was unconnected with any criminal offenses but who had the loyalty and persuasion of a person like G. Gordon Liddy. Under the structure of this legislation, those tapes would never have seen the light of day.

In summary, elimination of the "work product" concept and objective clarification of the coverage of the act would eliminate most of the difficulty in practical application of this Title of the legislation.

B. Title IV

Title IV dealing with remedies is also unclear. While the section provides for sanctions, it is unclear against whom such sanctions should be applied. Where a search warrant is obtained and executed in violation of the provisions of this legislation, who is to be the subject of the sanction? Is it the affiant upon whose testimony the warrant is isssued? Is it the neutral Judge who issued the warrant? Or, is it the officer or officers who pursuant to judicial order executed the warrant? Furthermore, which governmental body is the subject of sanctions when the affiant for the warrant is an officer of a municipal government, when the judge is a representative of state government and when the officers executing the warrant are representatives of county government?

We do favor Section 404 delaying implementation of the act on the state level but suggest that a two year period is a more realistic period to permit possible modifications of state criminal justice procedures.

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[17] The states have used a variety of approaches to resolve this difficulty. Some have developed their own definitions for press operations while others have adopted the federal approach.

VII. ANALYSIS OF RELATED LEGISLATION

A. S. 115

S. 115, introduced by Senator Mathias, is an all third party bill which is strongly opposed by NDAA for essentially the same reasons that it opposes the proposed Title III of Senator Bayh's original S. 1790. The exceptions permitting a search under exigent circumstances are far more narrowly drawn than those of Title III. Under my reading of the bill, a law enforcement officer could not search the premises of a third party even when there is probable cause to believe that the third party possesses the fruits or instrumentalities of a crime, or in an emergency situation where there is a risk of death or serious bodily injury to a person if the search is not conducted forthwith. The bill also appears to make the award of punitive damages for a violation of the proposed act to be mandatory.

This bill does have several provisions which are innovative and would alleviate certain problems found in the other proposals. S. 115 indirectly requires a state to comply with a clearly written standard of providing an adversary hearing before a court prior to the enforcement of a third party search order. While NDAA vehemently opposes any all third party bill and the application of such a rule to the states, the approach taken by S. 115 could be adapted and applied more narrowly if the Committee feels that Title I and Title IV of S. 1790 should be voted out.

S. 115 also has a provision permitting a party to knowingly waive an adversary hearing and voluntarily comply with a search order. This section is important because many third parties may wish to cooperate with law enforcement authorities and should be permitted to do so.

B. S.1816

S. 1816, introduced by Senator Nelson, is another all third party bill which is strongly opposed by NDAA. It is similar to S. 115 in that the exceptions permitting searches under exigent circumstances are too narrowly drawn. For example, the standard of "probable cause to believe," rather than "reason to believe," that materials sought to be seized would be destroyed is too high a standard. Most third parties bent on destruction of evidence will not exhibit the candor of an expressed intention to destroy such as that published by the editors of The Sanford Daily. Another inappropriate aspect of this bill is the application of the exclusionary rule under Section 4(a).

One positive aspect of S. 1816 is that it foresees one of the practical problems of *Zurcher*-type legislation in that it permits a search when the identity of the person in possession or control of the material cannot be ascertained.

VIII. Conclusion

In my testimony today I have attempted to touch upon some of the practical working problems which will confront law enforcement officers by reason of the adoption of S. 1790 or similar legislation. The problems which I have indicated are not necessarily exhaustive and are subject to the limits of my law enforcement knowledge and experience. Of paramount importance, however, is to note that today without the passage of this or similar legislation problems among prosecutors, the press, "innocent" third parties and privileged professionals are extremely infrequent in occurrence. Our society has much to gain through a healthy arms-length spirit of cooperation between representatives of prosecution and the Fourth Estate. In actual fact, examples of such voluntary cooperation between prosecution and the press are found every day throughout our country. We trust the honesty of our criminal defense bar and the clergy and physicians who minister to our citizens.

What must be strongly resisted are those calls to the barricades which would destroy what we perceive to be a current healthy relationship by pushing prosecutors and other professional or third parties into extreme positions of confrontation with one another. We should not lose sight of the fact that *Zurcher* represents exactly such an extreme position. Prosecutors have seldom sought search warrants for newspaper offices, lawyers' offices or psychiatrists offices. The avowed position of the Stanford Daily of destroying evidence is clearly not representative of the free press, of psychiatrists, or of our criminal defense bar in this country today.

We, as Prosecutors, do not believe that the necessity for S. 1790 and similar legislation has been demonstrated. We do not believe that such legislation, which would seriously affect the daily operations of our criminal justice system, should

be based on the extreme circumstances of a case like *Zurcher*. Above all, however, we believe that what may be most important is to avoid legislative action which forces the professionals to take extreme positions thereby destroying rather than enhancing what is currently a healthy and productive relationship in our society. In this regard, we ask for your thoughtful consideration.

On behalf of the National District Attorneys Association I appreciate the opportunity to appear before you and thank you for your consideration of our views.

APPENDIX

ASSOCIATION FOR THE ADVANCEMENT OF PSYCHOLOGY,
March 24, 1980.

Hon. BIRCH BAYH,
The Judiciary Committee,
U.S. Senate, Washington, D.C.

DEAR SENATOR BAYH: We understand that the Subcommittee on the Constitution will be conducting hearings on S. 1790, the Privacy Protection Act of 1979, on March 28, 1980.

As representatives of the American psychological community, with over 50,000 members, we concur with your effort as chief sponsor of this legislation to respond to the controversial *Zurcher* v. *Stanford* Supreme Court decision. The confidential nature of privileged communications should be respected. This is particularly true in the case of medical records. Indeed, the promise of this confidentiality is essential to the psychologist-client relationship.

We commend your bill's objective to provide protection to all innocent third parties from the possible abuse of the search warrant procedure.

We join with the American Civil Liberties Union, the American Psychiatric Association, and other organizations who have endorsed the goals of S. 1790. We look forward to the opportunity to work with you on the implementation of this proposal, which will serve only to reinstate those clear constitutional rights to individual privacy which are the hallmark of our nation.

Please do not hesitate to let us know if we can furnish any materials which would be helpful to you in your deliberations.

Sincerely,

MICHAEL PALLAK, Ph.D.,
Executive Officer,
American Psychological Association,
CLARENCE MARTIN,
Executive Director and General Counsel,
Association for the Advancement of Psychology.

NATIONAL NEWSPAPER ASSOCIATION,
March 31, 1980.

Hon. BIRCH BAYH,
Chairman, Subcommittee on the Constitution, Committee on the Judiciary,
Washington, D.C.

DEAR MR. CHAIRMAN: The National Newspaper Association endorses the approach of the American Newspaper Publishers Association and the American Society of Newspaper Editors, among other communications organizations, in their comments upon the bill you introduced, number S. 1790, to remedy the egregious situation created by the Supreme Court's decision in *Zurcher* v. *the Stanford Daily*. For your information, the National Newspaper Association represents the interests of more than 5,500 weekly and daily newspapers throughout the United States.

Although, as ANPA counsel Douglas Watts indicated in his testimony before your subcommittee on March 28, 1980, we join in ANPA's remarks, we should like to briefly reiterate the salient points of our position for the record.

The "rule of rummage" effectively established by the Supreme Court in the *Stanford Daily* is clearly repugnant to two hundred years of American legal history. It threatens press freedom and, indeed, the freedom of all Americans. We find it regrettable that the Congress must remind the Court of the scope of the First Amendment and the right to privacy, but we think acion by the Congress in the wake of the *Stanford Daily* is indispensable.

The implications of the Stanford Daily for newspapers and other communications media are pretty obvious: disruption of newsrooms; discouragement of sources for fear of revelation; and, perhaps, naked intimidation of journalists. Just as obvious, but less celebrated, are the implications for other professionals, and the average American citizen. For the professionals, such as doctors, lawyers and psychiatrists, privileges guaranteed under the law are no longer secure. File rooms can be disrupted and patients and clients can be daunted from being sufficiently forthcoming to enable their doctor or lawyer to adequately assist them. As for the average citizen, can (s)he be as secure in his or her home or otherwise as (s)he was before the *Stanford Daily* decision? Unannounced police searches of third parties undermine the right to privacy of all Americans as well as offend the principles of the First Amendment.

For these reasons, NNA strongly supports the concept of protection from unannounced searches by law enforcement officers for all third parties, that is, those not directly implicated in criminal activity, whatever their walk of life. Although less preferable, NNA would not oppose a measure which would protect the interests of professionals only. The least preferable option, in our opinion, is a media-only approach. The vital interests placed at stake by the *Stanford Daily* decision transcend the concerns of the press and electronic communications media. Thus, we again urge that a broad third-party protection be reincorporated into S. 1970.

With respect to the specifics of S. 1790 as it now stands, NNA does not disagree with the concept that certain situations can exist which would call for such a search. Thus, we do no oppose generally the exceptions specified in the bill. However, we join with ANPA in suggesting that use of the term "reason to believe", by reason of its lack of clear legal definition, leaves too much latitude to magistrates and judges. We believe that the term "probable cause to believe" which has a consistently accepted meaning throughout the legal community, provides a much surer and more reliable test, and comports with the Fourth Amendment's command that warrants shall not be issued "but upon probable cause . . . ."

The exception dealing with national defense information also, in our opinion, calls for some "fine tuning." The exceptions, as expressed in sections 101(a)(1) and (b)(1), again leave too much discretion to those administering the law. This time, they are executive branch officials. There would be no control under current wording, as to appropriate use of the classifying power; secrecy could be wielded by the incompetent or unscrupulous or just plain mistaken in a way that would cloak information not essential to the national security. The result would be unnecessary and unjustified expansion of this exception. Consequently, we urge you to impose a test beyond the classifying power of the bureaucracy, and require that a search can be justified only if the information, if disclosed, would pose a "direct, immediate and irreparable injury" to the national security. In this respect, at least, the Congress and the Supreme Court would fully agree, as the Court made clear in the *Pentagon Papers* case.

Turning to section 101(b)(4)(A), NNA again shares the concerns of ANPA that use of the word "appellate" might short-circuit the due process rights of those covered by the First Amendment by seeming to permit a search at the end of state court proceedings on subpoenaed information. In order to permit full litigation of a motion to quash, including a challenge in federal court, NNA urges that the term appellate be replaced with the term "judicial."

Section 101(b)(4)(B) also troubles us. Again, this could permit avoidance of the full process due upon a contest of a subpoena. It is far too easy to read this section to permit a search immediately upon denial of a motion to quash. It should be expressly clear that the Congress contemplates that an appeal may be taken from the denial prior to a search. Even more preferable, from our point of view, would be simple deletion of this provision.

Another specific problem, in our view, is the defense provided for law enforcement officials in section 402(a)(2), *i.e.*, if a newsroom search were conducted based upon "a reasonable, good-faith belief in [its] lawfulness." By providing this defense, the bill would remove an incentive for diligence on the part of law enforcement officers in their pre-search investigation. Essentially, there would be no penalty for the law enforcement official who subjectively believes his actions to be lawful—and what responsible official would not?—and no reason to "walk the extra mile" with the presearch investigation. The damage from an unlawful search is simply too great to permit such an easy slide out from under accountability.

Finally, we specifically endorse the suggestion of ASNE that an exclusionary rule be incorporated into the bill. It is a bit unrealistic to expect, as the Department of Justice evidently does, that no intentional transgression or misuse of the exceptions of this statute will occur. Nor should authentic mistakes be rewarded. The only sure way—as the courts have found—to remedy abuse and negligence, as well as deter reoccurrences, is to render any evidence collected as a result inadmissible. We submit that that approach, developed out of experience with searches generally, should be extended to the searches covered by S. 1790.

Mr. Chairman, the National Newspaper Association appreciates this opportunity to add its voice to the record compiled upon your bill. We thank the entire Committee for considering our views.

Respectfully submitted,

ARTHUR B. SACKLER,
General Counsel.

PREPARED STATEMENT OF THE NATIONAL ASSOCIATION OF PRIVATE PSYCHIATRIC HOSPITALS

The National Association of Private Psychiatric Hospitals is pleased for this opportunity to present our views on S. 115, The Third Party Privacy Act; S. 1790, Privacy Protection Act of 1979; and related legislation dealing with the effects of the recent Supreme Court decision *Zurcher* vs. *Stanford Daily*, 436 USC 547 (1978). The decision on this case strongly impacts on the doctor-patient relationship, and we strongly support legislation that would preserve the trust, confidentiality and integrity of this relationship.

The aNtional Association of Private Psychiatric Hospitals (NAPPH) is a nonprofit organization, representing over 180 free-standing (non-governmental) psychiatric hospitals providing multiple levels of care to children, adolescents, adults, geriatrics, and alcohol and substance abusers in need of active psychiatric care and treatment. Our member hospitals include services such as mental health centers, residential treatment centers for children, short and long-term care hospitals, university affiliated programs and psychiatric units in general hospitals which have been separately accredited under the psychiatric standards of the Joint Commission on Accreditation of Hospitals. All of our member hospitals are accredited as hospitals under the Accreditation Program for Psychiatric Facilities of the Joint Commission on Accreditation of Hospitals and are licensed as hospitals by their respective state agencies.

The Supreme Court's decision in *Zurcher* vs. *Stanford Daily* was a significant departure from prior decisions in the scope of confidentiality of records and privileged relationships, and a total departure from the public's assumptions of the absolute privacy of medical records. The threat to privacy violates all the expectations of both doctors and patients. By permitting search and seizure through the use of a warrant, the Supreme Court has posed one of the most severe threats to effective psychiatric treatment in recent years.

Successful treatment of mental illness requires extreme candor on the part of the patient. The information divulged by the patient is often of a highly personal, very intimate nature. The free exchange of this sensitive information between the doctor and the patient is the critical factor in effective diagnoses and subsequent treatment of mental illness. Patients will divulge such information only with an iron-clad assurance that in no case will it ever be divulged to anyone not a part of the treatment team. The threat of exposure of this information by search and seizure violates this fundamental expectation of privacy. We consider the only appropriate method for law enforcement officials use is the subpoena, with all of its provisions for due process and the opportunity for a thorough examination of the need for any specific information. The use of a warrant has a significant potential for abuse, and no opportunity for affected parties to present their side of the story.

We would like to note that this expectation of privacy is not only critical to the treatment of mental illness, but applies to the medical profession as a whole. Mental illness often is discovered through physical symptoms, or in a routine physical examination. The total expectation of confidentiality is critical to the practice of medicine in any form.

NAPPH would like to take exception to the Federal Bureau of Investigation assertion that this legislation is not needed because no significant abuses have occurred. It is the threat of possible abuse that is the most damaging factor.

Individuals with knowledge of the implications of the Zurcher decision have a strong deterrent to seeking treatment. This resistance to seeking needed care will increase as the ramifications of this decision become more widely known and understood by the general public. It is imperative that the confidentiality of patient records be afforded statuatory protection. The issue is too basic to leave to the concept of good faith on the part of all parties involved. We feel it is imperative that any legislation must cover all forms of law enforcement activity; including state and local officials. Without an across the board expectation of privacy, this legislation cannot hope to be effective.

We urge your strong support of the concepts espoused in this statement as you consider S. 115, S. 1790, and related legislation. The potential damage of the Zurcher decision demands a strong and assertive reaction on the part of the Congress.

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
42 WEST 44TH STREET
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COMMITTEE ON CIVIL RIGHTS

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June 10, 1980

Honorable Edward M. Kennedy
Chairman
Senate Judiciary Committee
Dirksen Senate Office Building
Suite 2226
Washington, D. C. 20510

Re: S.115
S.855
S.1790

Dear Mr. Chairman:

The Committee on Civil Rights is responsible for reviewing and reporting upon, on behalf of the Association, significant legislation in the civil rights and civil liberties field. I enclose our Committee report on the above legislation, which would, generally, require law enforcement agencies to proceed by subpoena, rather than search warrant, when seeking evidence in a criminal investigation from persons not suspected of involvement in the crime.

The report spells out in some detail why we believe this legislation is essential to better secure the right of privacy of all Americans, and, in particular, the right to be free from unnecessarily intrusive searches in criminal investigations. Absent extraordinary circumstances, there is no sound reason to subject citizens not suspected of criminal involvement to unannounced, intrusive searches. Rather, as the proposed legislation would require, such non-suspect "third parties" should be given an opportunity, by service of a subpoena, to gather and produce voluntarily the evidence sought by the government or to raise any objections to the government's subpoena in court.

Searches pursuant to warrant present special threats to First Amendment rights in instances where the party searched is a newspaper or some other person engaged in First Amendment activities. Searches of the offices of lawyers and doctors also raise special dangers that the attorney-client or doctor-patient privileges will be violated by seizure of privileged documents before there is any opportunity to assert the privilege in court. But more generally, every citizen has the right to expect that his or her government will use the least intrusive means possible in seeking to obtain evidence. Indeed, the record before your Committee demonstrates that the "subpoena-first" procedure for third parties which would be required by this legislation reflects the current actual practice of most prosecuting offices, and certainly of the Justice Department.

The Supreme Court, as you know, has held that the general language of the Fourth Amendment's prohibition of "unreasonable" searches and seizures is insufficient to require the use of subpoenas in all third-party situations. Zurcher v. Stanford Daily, 436 U.S. 547 (1978). The Court was careful to note, however, that:

> ". . .the Fourth Amendment does not prevent or advise against legislative or executive efforts to establish nonconstitutional protections against possible abuses of the search warrant procedure. . . ." (Id. 436 U.S. at 567).

The proposed legislation before your Committee would provide just such important "nonconstitutional protections."

Our report supports legislation, such as S.115 and S.1790, which would protect all third parties. While we agree that there are special reasons to be concerned when searches threaten First Amendment activities, we do not agree with the premise underlying S.855: that it is only those engaged in First Amendment-protected activities who require legislative protection from searches. To the contrary, the interests of privacy which we view as at stake apply to all citizens.

We believe that the seeming contention of the Justice Department that this legislation will lead to the frequent loss of evidence is without foundation. S.115 and S.1790 both contain appropriate exceptions to enable the use of search warrants, even where evidence is in the hands of a third party, whenever there is shown to be a substantial risk that service of a subpoena might lead to the destruction of evidence. In actual practice, subpoenas are often employed today even where the evidence is in the hands of the actual suspect, and the subject legislation exempts all such suspect-possession cases from its scope.

However, even if it be assumed that occasionally evidence will be lost as a result of service of a subpoena, this is an insufficient objection to the legislation. "Mere evidence," as a general rule, was wholly beyond the reach of law enforcement agencies through the use of search warrants from the foundation of the Republic until 1967, when the Supreme Court first held that such "mere evidence" was subject to seizure. Warden v. Hayden, 387 U.S. 294 (1967). Our country well survived the mere evidence rule's general prohibition of evidentiary search warrants for almost 200 years. In light of that, we submit that even if this legislation's limited restriction upon search warrants does result in an occasional loss of evidence, this is a small enough price to pay for the significant increase in the right of privacy of every American which the legislation would achieve.

This legislation, we understand, is currently under active consideration by your able Subcommittee on the Constitution, chaired by Senator Bayh. Analogous legislation has already been reported out by the House Judiciary Committee and is before the House Rules Committee. We urge that your Committee give this important legislation its favorable attention, since we believe its passage would be an important step forward in better securing the rights of all Americans to be free from unnecessarily intrusive governmental searches.

Thank you very much for your consideration of our position.

Very truly yours,

COMMITTEE ON CIVIL RIGHTS

By: 
Thomas H. Moreland, Chairman

THM:je
Enclosure

cc: Honorable Birch Bayh, Chairman
Subcommittee on the Constitution

Members of the Senate Judiciary Committee

ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

COMMITTEE ON CIVIL RIGHTS

REPORT ON

LEGISLATIVE RESPONSE TO ZURCHER v. STANFORD DAILY

INTRODUCTION

In Zurcher v. Stanford Daily,[1/] the United States Supreme Court held that a search pursuant to warrant of newspaper offices for photographs sought as evidence in a criminal investigation violated neither the Fourth Amendment's prohibition of unreasonable searches and seizures, nor the First Amendment's protection of freedom of the press, even though the police did not first attempt to subpoena the photographs. The opinion provoked considerable comment, and has resulted in proposals to prohibit by statute the type of search found constitutional in Zurcher.

The proposals for legislation fall into two principal categories. The first type of legislation would limit all searches by warrant of "third parties," i.e., persons not suspected of having committed the crime under investigation. Those bills would require law enforcement agencies, instead, to secure evidence from such persons through

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1/ 436 U.S. 547 (1978).

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tecum, or a similar process affording notice and the opportunity for a hearing to the person in possession of the evidence sought. The second type of legislation would provide this protection only for the press, or others engaged in the type of public communication protected by the First Amendment.

Whether or not the Supreme Court's decision in Zurcher is correct, we believe that, given that decision, legislation is appropriate to protect further the right of all third parties, including the press, to be secure from unduly intrusive searches and seizures.

I

THE DECISIONS IN ZURCHER v. STANFORD DAILY

On April 12, 1971, the Palo Alto, California Police Department conducted, pursuant to a warrant, a search of the offices of the Stanford student newspaper for negatives, films, and pictures revealing the identities of the persons who had assaulted police officers during a demonstration a few days earlier at the University hospital. The newspaper had published articles and photographs of the demonstration the day before the warrant was issued and the search conducted. The newspaper's photographic laboratories, filing cabinets, desks, and waste-paper baskets were searched. The police officers found only

the photographs that had already been published, and therefore removed no material from the newspaper's office.[2/]

One month later, the newspaper and several members of its staff commenced an action in the United States District Court for the Northern District of California seeking declaratory and injunctive relief, under 42 U.S.C. § 1983, against the police officers who conducted the search, the Chief of Police, the District Attorney and one of his deputies, and the judge who had issued the warrant. The complaint alleged that the search was unconstitutional under both the First and Fourth Amendments, as applied to the states through the Fourteenth Amendment.[3/]

A. The Decisions of the District Court and the Court of Appeals

On a motion for summary judgment, the District Court granted the newspaper declaratory judgment, holding the search of the newspaper offices unconstitutional under both the First and Fourth Amendments.[4/]

The District Court, while not questioning the existence of probable cause to believe that a crime had been committed

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2/ 436 U.S. at 551-52.

3/ 436 U.S. at 552.

4/ 353 F. Supp. 124 (N.D. Cal. 1972).

and that relevant evidence would be found in the newspaper's offices, held that the Fourth Amendment prohibits the issuance of a search warrant addressed to an innocent third party unless there is also probable cause to believe that use of the less intrusive subpoena duces tecum would be impracticable. It also held that the First Amendment afforded additional protection to the press, and that a search of a newspaper could only be justified "in the rare circumstance where there is a clear showing that (1) important materials will be destroyed or removed from the jurisdiction; and (2) a restraining order would be futile."[5/] The Court of Appeals affirmed, adopting the opinion of the District Court.[6/]

B. The Decision of the Supreme Court

By a five-to-three vote, with Justice Brennan not participating, the Supreme Court reversed, and held the search constitutional.

1. The Majority Decision

In an opinion by Justice White, the Court held that there was no constitutional basis for the "third party" rule

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5/ 353 F. Supp. at 135.

6/ 550 F.2d 464 (9th Cir. 1977).

adopted by the District Court and the Court of Appeals. The Court held that:

> [o]nce it is established that probable cause exists to believe a federal crime has been committed a warrant may issue for the search of any property which the magistrate has probable cause to believe may be the place of concealment of evidence of the crime.7/

The Court further stated that "there is no suggestion that the occupant of the place to be searched must himself be implicated in misconduct."8/ To the contrary, the Court held:

> The Fourth Amendment has itself struck the balance between privacy and public need, and there is no occasion or justification for a court to revise the Amendment and strike a new balance by denying the search warrant in the circumstances present here and by insisting that the investigation proceed by subpoena duces tecum, whether on the theory that the latter is a less intrusive alternative, or otherwise.9/

The Court also stated that, although "[w]here the materials sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with 'scrupulous exactitude'" (quoting Stanford v. Texas, 371 U.S. 476, 485 (1965)), the First Amendment does not justify the strict rules adopted by the District Court for searches of newspapers and other media.10/

7/ 436 U.S. at 558.

8/ 436 U.S. at 559.

9/ Id.

10/ 436 U.S. at 564-65.

While holding that the search was constitutional, the Court's opinion contemplated that there might be legislation to prohibit searches like the one conducted of the Stanford Daily's offices:

> Of course, the Fourth Amendment does not prevent or advise against legislative or executive efforts to establish nonconstitutional protections against possible abuses of the search warrant procedure, but we decline to reinterpret the Amendment to impose a general constitutional barrier against warrants to search newspaper premises, to require resort to subpoenas as a general rule, or to demand prior notice and hearing in connection with the issuance of search warrants.11/

2. Justice Stewart's First Amendment Dissent.

Justice Stewart, joined by Justice Marshall, dissented solely on First Amendment grounds, arguing that the First Amendment gave special protection to the press and that "it seems to me self-evident that police searches of newspaper offices burden the freedom of the press."12/ The dissent stated that "a prior adversary hearing" was "required to assess in advance any threatened invasion of First Amendment liberty."13/

3. Justice Stevens' Fourth Amendment Dissent.

Justice Stevens was the sole member of the Court to dissent on Fourth Amendment grounds. He wrote:

11/ 436 U.S. at 567.

12/ 436 U.S. at 571.

13/ 436 U.S. at 575.

> "The only conceivable justification for an unannounced search of an innocent citizen is the fear that, if notice were given, he would conceal or destroy the object of the search."14/

Justice Stevens therefore approved the "third party" rule adopted by the lower courts, and found it unnecessary to address the First Amendment issue.

II

SUBPOENAS DUCES TECUM, SEARCH WARRANTS, AND THE INTERESTS THEY AFFECT

A. The Historical Development of Protection Against Unreasonable Searches. 15/

The protection against unreasonable searches is rooted in a belief in the sanctity of the home, which has been recognized in law since the earliest of legal systems.

The Magna Carta is often regarded as the foundation of common-law protection against unreasonable searches and seizures, but even before 1215 England had dealt severely with domus invasio.16/ However, much later the Star Chamber

14/ 436 U.S. at 582.

15/ See generally, Lasson, The History and Development of the Fourth Amendment to the United States Constitution. This extremely informative work was originally published in 1937 as Series LV, Number 2 of "The Johns Hopkins University Studies in Historical and Political Science." It was republished in 1970 as part of "Da Capo Press Reprints in American Constitutional and Legal History." References below to "Lasson" are to the 1970 edition. See also Stanford v. Texas, 379 U.S. 476, 481-85 (1965).

16/ See Lasson, supra note 15, at 18-19.

regularly used warrants issued without any oath or showing probable cause, and with no attempt to specify either the people or places to be searched or the things to be seized.17/

It was in the mid-Eighteenth Century, just prior to the American Revolution, that the decisive challenge to such general warrants was mounted in a series of cases involving alleged crimes against the Crown committed by the members of the press who were the targets of searches.18/

The most famous of these cases is Entick v. Carrington.19/ Entick, a pamphleteer critical of the government, brought a trespass suit against the King's messengers who had executed on a general warrant, signed by the Secretary of State, to seize Entick, "together with his books and papers . . . "20/ The Court held the warrant unlawful, stating that to uphold the power claimed by the Crown would be "subversive of all the conforts of society."21/

> [I]f this point be determined in favor of the [Crown], the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the

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17/ See Lasson, supra note 15, at 24-27.

18/ See Lasson, supra note 15, at 43-49.

19/ 19 Howell's State Trials 1029 (1765).

20/ Id. at 1031.

21/ Id. at 1066.

> search and inspection of a messenger, whenever the secretary of state shall think fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel.22/

Entick v. Carrington and its progeny proscribed not only general searches, but also any search for and seizure of papers or other matter in which the government had no property interest superior to that of their possessor. This meant that contraband and the fruits and instrumentalities of a crime could be seized, no citizen having the right to possess same, but that evidence of a crime was secure from seizure. See Warden v. Hayden, 387 U.S. 294, 303-04 (1967).

The use of general seach warrants by English governments did not stop at the ocean. In America the enforcement of the English trade laws through the use of the writs of assistance provided an impetus for the American Revolution.23/ The desire for protection against unreasonable searches and seizures led to the inclusion of prohibitions of them in many of the colonial Declarations or Bills of Rights,24/ and then, in 1791, in the Fourth Amendment to the United States Constitution:

22/ Id. at 1063-64.

23/ See the authorities collected at Lasson, supra note 15, at 51 n.1, 58-59.

24/ See generally 1 B. Schwartz, The Bill of Rights, A Documentary History (1971).

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

As Mr. Justice Stevens recognized in his dissent in Zurcher (436 U.S. at 577), the Fourth Amendment has two separate and distinct clauses. The first outlaws all unreasonable searches, while the second prescribes the procedural requisites for issuance of a warrant. See Warden v. Hayden, supra, 387 U.S. at 301. The Amendment thus does not articulate the principle that all searches pursuant to a proper warrant are reasonable, or that all searches without a proper warrant are unreasonable. See Arkansas v. Sanders, ____ U.S. ____, 99 S. Ct. 2587, 2589-91 (1979) The two clauses of the Amendment are distinct, though united in having as their basic purpose "to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." Camara v. Municipal Court, 387 U.S. 523, 528 (1967).

B. The Privacy Interests Affected By Search Warrants and Subpoenas Duces Tecum.

A comparison of the characteristics of subpoenas duces tecum and search warrants yields the conclusion that subpoenas, on balance, are far less intrusive of privacy interests than warrants.

A subpoena, while carrying the imprimatur of the court and the sanctions available to the court, is usually issued by a prosecutor under the authority of a sitting grand jury (see Fed. R. Crim P. 17). It calls for the recipient to produce specified materials at a particular place and time. The place is normally the courthouse, and the time is a specified hour on a day typically somewhere between two days and two weeks after the subpoena is served.

A search warrant, on the other hand, may be issued only by a magistrate or judge, and only upon a sworn application by a law enforcement official establishing probable cause to believe that specified evidence of a crime is located at the place sought to be searched (see Fed. R. Crim P. 41). The warrant, issued without prior notice to the owner of the premises to be searched, authorizes law enforcement officers to enter a private area, using force to gain entry if admission is refused by those present (see 18 U.S.C. §3109), and search for and seize the items specified in the warrant. In addition to the items specified, the officers may also seize, it would appear, other evidence in plain view, Coolidge v. New Hampshire, 403 U.S. 443, 465-70 (1971); United States v. Golay, 502 F.2d 182, 184-86

(8th Cir. 1974); and also evidence "reasonably related to the crime for which the warrant issued."[25/]

The procedure for issuance of a warrant, with its advance judicial scrutiny, may be somewhat more protective of privacy interests than the procedure for issuance of a subpoena, controlled by the prosecutor alone. But the subpoena's greater protection of privacy interests on balance is firmly based upon other distinctions from the warrant.

The most important distinction is that between the immediate physical intrusion occasioned by execution of a warrant, and the notice with opportunity for a prior hearing afforded by a subpoena. The subpoena is only a notice, and its service allows the recipient the opportunity, if aggrieved, to apply to the court for relief from compliance with all or a portion of the subpoena. The result of this application is an adversary hearing, with both the government and the recipient present to argue their positions. Our entire system of justice is hinged on the premise that an adversary hearing is the

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25/ Taylor v. Minnesota, 466 F.2d 1119, 1121 (8th Cir. 1972), cert. denied, 410 U.S. 956 (1973). See Andresen v. Maryland, 427 U.S. 463, 479-82 (1976) (warrant, after listing specific items to be seized, may also authorize seizure of "other fruits, instrumentalities and evidence of [the] crime at this [time] unknown").

surest protection of fairness and justice. The subpoena process allows for that adversary hearing before any property can be taken from a person.

Such a notice and hearing procedure not only protects privacy interests against unnecessary physical intrusions, but also facilitates protection of other interests and privileges which a search may jeopardize. For example, the Zurcher search, though held not to violate the First Amendment interests of the newspaper, plainly intruded upon those interests. Searches of the press can result in the destruction of the confidentiality of news sources and the disruption of the editorial process. Searches may also intrude upon recognized common law privileges, such as the attorney-client privilege. Any such First Amendment interests or common law privileges may be asserted in a motion to quash a subpoena, and their validity determined before the documents are seized.

A search warrant, however, is executed without any advance notice or opportunity for a hearing. The owners or occupants of the premises are not told that an application for a warrant is being made, and they are not consulted about the wisdom or appropriateness of the search. The warrant is executed at the convenience of the police, and this may be the worst time for the subject, who first learns that the search is to take place when answering the knock at the door.

Plainly the subject of a search has no opportunity to challenge it in advance. The validity of the search can sometimes be challenged after the fact, either by a criminal defendant in a motion to suppress the fruits of the search in a subsequent trial, or by any person aggrieved in a civil action for damages. Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). But even if the search is held illegal, the damage to privacy and other interests or privileges has already been done, and such damage is difficult to quantity in money.

Searches tend to be especially intrusive of privacy interests when the objects of the search are papers or other documents. The extent of police involvement in locating the papers sought can be extensive, for the papers often will be mixed in with other papers. Even the most careful particularization of the documents sought will not avoid the need for the police to "rummage" through many other irrelevant documents to locate those sought.

If a subpoena rather than a warrant is used to seek papers and documents, in contrast, the recipient can make his own search, isolate the specific materials subpoened, and produce them. His privacy as to all other materials is protected. Further, in producing documents in response to a subpoena, the recipient can carefully sort and keep his files organized. On

the other hand, after the police have executed a warrant, the party's files searched may well be left in a state of disarray. Cf. Duncan v. Barnes, 592 F.2d 1336 (5th Cir. 1979).

Searches for papers and documents were generally prohibited until, in Warden v. Hayden, 387 U.S. 294 (1967), the Supreme Court abandoned the "mere evidence" rule, which, consistent with English law since at least Endick v. Carrington (see pp. 8-9, above), had restricted the scope of searches to instrumentalities and fruits of a crime and contraband. E.g., Gouled v. United States, 255 U.S. 298 (1921). Thus the dramatic expansion in Warden v. Hayden of the scope of searches, coupled with the unrestricted Fourth Amendment approval of third party searches in Zurcher, have reduced sharply every person's zone of privacy previously protected against governmental intrusion.

As a more general observation, it would appear that many courts have narrowly construed the Fourth Amendment (see, e.g., cases cited at pp. 11-12, above), because issues concerning its scope most frequently are presented by convicted criminal defendants seeking their freedom through reliance on the exclusionary rule, a rule many judges find all but intolerable. See, e.g., Stone v. Powell, 428 U.S. 465, 496-502 (1976) (Berger, C.J., concurring). But one consequence of these

"anti-criminal" decisions has been to limit the rights of privacy of all citizens. Especially the innocent third party, unable even to invoke the exclusionary rule, needs additional protection from unnecessarily intrusive searches and seizures.

C. The Less Intrusive Alternative

We submit that one principle of privacy rooted in the Fourth Amendment is that the government should not intrude into its citizens' (or non-citizens') affairs more than is necessary to serve legitimate government purposes.[26/] A corollary is that subpoenas should generally be used by law enforcement agencies, rather than search warrants, whenever the law enforcement interests adequately may be served by subpoenas. We believe law enforcement interests can be so served through use of a subpoena, rather than a warrant, whenever the material sought is in the possession of a person not suspected of having committed the crime under investigation, and where there is no reason to believe that the material sought will be lost or destroyed if a subpoena is served upon such person.

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26 Cf. Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971) (concerning purpose of Fourth Amendment's warrant requirement):

> "The premise here is that any intrusion in the way of search and seizure is an evil, so that no intrusion at all is justified without a careful prior determination of necessity."

Even though Zurcher holds that this broader notion of "reasonableness" is not mandated by the Fourth Amendment itself, we believe that it does better secure the interests of privacy protected by the Fourth Amendment, and that its legislative enactment would be within the constitutional powers of Congress (see pp. 48-60, below).

In the following section, we examine some legislative proposals designed to apply this "subpoena-first" requirement, in whole or in part, to federal, state and local proceedings.

III

PROPOSED FEDERAL LEGISLATION

A. Introduction

Following the Zurcher decision, over a dozen bills were introduced in Congress aimed at prohibiting the type of searches found constitutional in Zurcher.[27/] The Senate Judiciary Committee's Subcommittee on the Constitution conducted hearings on this Zurcher legislation in 1978 during the 95th Congress,[28/] and again recently in March 1980 during the 96th Congress. Hearings

27/ Similar legislation has been introduced in at least 19 states. 3 Media L. Rep. 2377, July 17, 1979. See, e.g., Calif. Assembly Bill No. 1609, Apr. 2, 1979.

Wisconsin, reportedly, recently has enacted legislation precluding the use of search warrants to obtain documents from third persons not "reasonably suspected of criminal involvement". N.Y. Times, Dec. 16, 1979, sec. 4, p. 20e, col. 1.

28/ United States Senate, Committee on the Judiciary, Subcommittee on the Constitution, Hearings on Citizens Privacy Protection Act, 95th Cong., 2nd Sess. (hereinafter "Hearings").

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were also held in 1979 by the House Judiciary Committee's Subcommittee on Courts, Civil Liberties and the Administration of Justice.

Of the many bills introduced, attention has focused upon these three:

1. S.855, a bill sponsored by the Carter Administration and introduced by Senator Bayh, principally designed to protect First Amendment interests and thus covering only persons who possess documents "in connection with a purpose" to engage in some form of "public communication" (§2(a));

2. S.1790, introduced by Senator Bayh, which includes the full text of S.855, but adds to it two titles extending its protection to all third parties, and providing special protection for materials that would be privileged under applicable local law; and

3. S.115, introduced by Senator Mathias, which also, like S.1790, extends its protection to all third parties, but does not differentiate between First Amendment-protected or privileged documents and all other materials.

For reasons explained below, we favor enactment of a broad third-party bill, since we believe that it is all third parties, and not just First Amendment-protected possessors, who should be protected against unnecessary searches. As between

S.115 and S.1790, the two broad third-party bills, we favor enactment of S.115, with minor modifications, since it is broader in scope and yet simpler in its structure.

However, the narrower S.855 does advance important First Amendment interests. We would support its enactment, with the modifications suggested below (pp. 35-49), should there be insufficient support for a broad third-party bill at this time.[29/]

B. Outline of the Three Bills

1. S.855: a First Amendment bill

The Administration's bill S.855 is designed to protect First Amendment interests in the context of searches and seizures in furtherance of criminal investigations. Its protection extends to all documents:

> possessed by a person in connection with a purpose to disseminate to the public a newspaper, book, broadcast or other similar form of public communication. . . . (§2(a)).

Within this broad category of "documentary materials" there is a subcategory, entitled "work product," which receives additional protection. Work product is defined as documentary materials:

29/ On April 17, 1980, the full House Judiciary Committee reported out bill H.R. 3486, which is now pending before the Rules Committee. H.R. 3486 applies only the limited First Amendment approach of S.855 to state and local governments, but would impose the broader third party protection upon the federal government. Our discussion below, while focusing on the pending Senate bills, is equally applicable to H.R. 3486.

created by or for a person in connection with his plans, or the plans of the person creating such materials, to communicate to the public. . ., [excepting contraband or the fruits or instrumentalities of a crime] (§5(b)).

With respect to all documentary materials, the bill prohibits their search or seizure unless one of these four exceptions is met:

(1). There is probable cause to believe that the person possessing the materials has committed or is committing the criminal offense for which the materials are sought. . .;30/

(2). There is reason to believe that the immediate seizure of the materials is necessary to prevent the death of or serious bodily injury to a human being; or

(3). There is reason to believe that the giving of notice pursuant to a subpoena duces tecum would result in the destruction, alteration and concealment of the materials; or

(4). The materials have not been produced in response to a court order directing compliance with a subpoena duces tecum and

(A) all appellate remedies have been exhausted; or

(B) there is reason to believe that the delay in an investigation or trial occasioned by further proceedings relating to the subpoena would threaten the interests of justice. . . .31/ (§2(b)(1)-(4)).

30/ This exception is not available where the criminal offense consists only of the "receipt, possession, communication or withholding of such materials or the information contained therein" (§2(b)(1)), unless the subject of the offense is "information relating to the national defense, classified information, or restricted data" under specified statutes (§2(b)(2)). See pp. 44-45, below.

31/ This last exception, however, cannot be used until the person possessing the materials has been "afforded adequate opportunity" to oppose the requested search warrant by affidavit (§2(b)(4)(B)).

If the documentary materials also qualify as "work product," however, the exceptions numbered (3) and (4) above are not available to the government. Thus, the government will have no way to obtain such "created" materials as reporters' notes and unpublished drafts unless there is probable cause to suspect the possessor of having committed the crime, or unless the rarely applicable "death or serious bodily injury" exception is present. Absent such exceptions, in effect S.855 gives the possessor a right to withhold these work product materials, and instead to suffer the penalties for contempt for refusal to comply with a subpoena. This protection for work product materials is in furtherance of the drafters' belief that such materials "generally should not be subject to search and seizure by law enforcement officers." Cong. Rec. S 3792, Apr. 2, 1979 (section-by-section analysis of S.855). The passage of S.855 thus, in the words of Assistant Attorney General Philip B. Heymann,

> will permit the press and others who rely on confidential sources in gathering information to insure that their sources identities will not be compromised through police searches. (Hearings at 343).

The bill relies upon a civil suit for damages as the appropriate form of redress for its violation (see pp. 45-46, below).

2. S.1790: A First and Fourth Amendment bill

Senator Bayh, in Titles I and IV of his bill S.1790, has incorporated the entire text of bill S.855, but he has added two titles designed to extend protection to all third parties, regardless of whether their activities implicate any First Amendment interests.

Title II of S.1790, labeled "Confidential Information Protection," would preclude, subject to the same four exceptions as apply to "documentary materials" under S.855 (see pp. 19-20, above), the search and seizure of any documentary or work product materials

> that would be considered by the jurisdiction of the person in possession of the materials to be privileged material under the jurisdiction's statutory or case law. (§2(a))

Title III, labeled "Citizen's Privacy Protection," would preclude, again subject to the same four S.855 exceptions (§3(a)), the search or seizure of any "documentary or work product material possessed by any person", i.e., whether or not possessed in connection with a purpose of public communication.32/

32/ There appear to be a few technical drafting errors in S.1790, which can easily be rectified. First, although Titles II and III extend their protection to documentary and "work product" materials, and even reflect a special definition of work product for their purposes (§6(b)), they in fact provide no special protection for work product materials as distinguished from documentary materials. Therefore, in the context of these two titles, "work product materials" is superfluous and should be stricken.

(Footnote continued)

3. S.115: a Fourth Amendment bill

S.115, introduced by Senator Mathias, also would extend its protection broadly to all third parties, but contains no provisions giving special protection to First Amendment-protected or privileged documents. It was introduced before S.855 and its progeny S.1790, and is somewhat simpler in its form.

S.115 extends its protection to any "third party," which it defines as:

> a person whom there is no probable cause to believe has committed the crime to which the matter sought relates (§5(a)).

S.115 would prohibit issuance of a warrant for the search and seizure of matter in possession of a third party.

(Footnote continued)

> A possible ambiguity in S.1790 is created by the fact that Titles II and III might apply to materials that are also within the scope of Title I, i.e., the S.855 provisions protecting "work product materials" possessed in connection with a purpose of public communication. Since the protection afforded work product materials under Title I is greater than the protection afforded under Titles II and III, those latter titles should be amended to make clear that it is Title I which exclusively regulates materials within its scope.
>
> Finally, while the section-by-section analysis of Titles II and III (Cong. Rec. S 13196-97, Sept. 21, 1979) states the clear intention of the drafters that the "criminal suspect" exception be subject to the same limitations as provided in S.855 (see p. 20 n.29, above), the limiting language has simply been omitted from Titles II and III by inadvertence, and thus should be added.

Further, it prohibits issuance of an order compelling a third party to produce such matter unless, prior to enforcement of the order, the third party is permitted an adversary hearing at which the order will be quashed absent a judicial determination that (i) the order "is authorized by law," and (ii) "no privilege or legal grounds exist that justify the refusal to produce the matter" (§2(b)).

To these prohibitions, S.115 recognizes one general exception. Its notice and hearing procedure need not be used if an applicant for a warrant (or order without hearing) shows upon "personal knowledge" that "there is probable cause to believe," if a notice and hearing procedure were used, that the matter sought "will be destroyed, altered, or put beyond the control or jurisdiction of the court. . ." (§3(a)).

This exception is equivalent to exception (3) of S.855 and S.1790, with two important differences. First, it uses a "probable cause" standard rather than the "reason to believe" standard of the latter two bills, which the drafters of those bills expressly intend "to be considerably less stringent than the standard of probable cause" (Cong. Rec. S 3792, Apr. 2, 1979) (section-by-section analysis of S.855). Second, S.115 specifically requires that the exception can be invoked only if a judge or magistrate determines that the applicant has established the requisite probable cause upon

"personal knowledge". S.855 and S.1790 do require such a showing upon personal knowledge but rather simply incorporate existing law which, at the federal level, expressly permits hearsay. Fed. R. Crim. P. 41(c)(1).

S.115 also would not require use of the notice and hearing procedure upon a showing of probable cause that the matter sought to be seized is contraband (§3(b)). Aside from "contraband," however, S.115 applies to "matter" (§2(a)) of any sort; it is not limited to "documentary materials," as are S.855 and S.1790.

C. Discussion of the Three Bills

1. The choice between First Amendment and Fourth Amendment legislation

The most fundamental choice presented by the three bills outlined above is that between S.855's approach, limited to the protection of First Amendment interests,[33/] and the broader third-party approach taken by S.1790 and S.115, rooted in the Fourth Amendment. We favor a bill extending its protection to all third parties. Although the press has a particular interest in freedom from intrusive searches, the privacy interests we view as jeopardized by Zurcher extend to all citizens.

33/ While the Administration choses to rely on the commerce clause as the constitutional basis for S.855 (see pp. 58-59, below), plainly the interests S.855 is designed to protect are founded upon the First Amendment's free speech and free press guarantees.

We agree with Justice Stevens' conclusion, dissenting in Zurcher (see p. 7, above), that the only proper justification for a third party search is a fear that, upon notice, the third party would conceal or destroy the evidence sought. Even most law enforcement officials who oppose third party legislation agree that the use of search warrants against third parties should be minimized because of the privacy interests at stake. Thus Assistant Attorney General Heymann, though opposing third party legislation, testified before the Senate subcommittee considering post-Zurcher legislation as follows:

> Whether we are talking about arrests of individuals or searches and seizures of things, any decent government should attempt to use the least force possible in dealing with its citizens. If what is sought is a document, it should simply be requested if that will do the job. If a request is insufficient, evidence should be subpoenaed. A search should be resorted to only if a request or a subpoena would threaten legitimate law enforcement purposes" (Hearings at 58).

These privacy interests which counsel the use of a subpoena when materials are in the possession of third parties apply with full force whether or not the third party happens to be involved in a "public communication" activity protected by the First Amendment. The First Amendment interests of the press were specially implicated in the Zurcher search, to be sure. But the search would have been no less intrusive of privacy interests had its subject been an amateur photographer

who had taken photographs of the demonstration for personal use, rather than the photography staff of a newspaper which had taken the photographs for publication.

Thus if privacy and freedom from unnecessary governmental intrusion be the interests in need of legislative reinforcement following Zurcher, as we believe, then there seems no justification for singling out only the press and other public communicators for protection. Given proper protection of the interests of all third parties, any special guarantees for the press become unnecessary.

However, in the event that Congress deemed broad third party legislation inappropriate at this time, then we would favor enactment of S.855, with the modifications suggested below. S.855 will achieve the important goal of better securing the public's First Amendment interest in a strong and vigorous free press. Further, its enactment hopefully would represent a first step toward third party legislation.

2. The need for third party legislation

Law enforcement officials argue that there is no need for a third party bill, claiming that in practice government investigators already use the "subpoena first"

approach wherever it is practical.[34/] Is, then, third party legislation really needed?

It does seem to be a fact, historically, that searches of third parties have been relatively infrequent. However, we fear that the Zurcher decision, by holding such searches constitutional, may have encouraged them. Since Zurcher, there seems to have been a perceptible increase in the use of search warrants against lawyers.[35/] To date, the existence of

34/ See, e.g., Brief of Solicitor General as amicus curiae in Zurcher at 22:

> [T]he fact[s] that the warrant mechanism is relatively cumbersome and demanding and that searches perceived as unnecessary by the citizenry can be destructive of police-community relations . . . [are] considerations that make law enforcement officials unlikely to seek a warrant in the first instance unless they have some reason to fear that less drastic measures will prove inadequate.

35/ The Minnesota Supreme Court recently invalidated as unreasonable, under both the Fourth Amendment and the Minnesota Constitution, a search warrant directed against a lawyer not suspected of criminal involvement, and issued without any showing that the documents sought would be destroyed if subpoened. O'Connor v. Johnson, 287 N.W.2d 400 (1979). In O'Connor, three policemen appeared without warning at the lawyer's office, armed with a warrant seeking a file of documents in and for a criminal investigation of the lawyer's client. The lawyer refused to let the policemen see his files, saying they contained privileged material. The policemen were quoted as responding, "What does that have to do with anything? We have a warrant." National Law Journal, Feb. 26, 1979, p. 3, col. 2.

(Footnote continued)

any trend with respect to the media is less apparent.[36/]

(Footnote continued)

In California, reportedly, two warrants directed against California law firms have been invalidated on similar grounds, while a third warrant has been upheld since the lawyer was a target of the criminal investigation. National Law Journal, Nov. 26, 1979, p. 3, col. 1. Deukmejian v. Super. Ct., Super. Ct. L.A. Co., _____, Apr. 12, 1979 (preliminary injunction granted restraining enforcement of search warrant against law firm not suspected of criminal involvement), app. pending, Court App. 2d Dist., 2d Civil No. 55977; In re Search Warrant, No. 15591, Los Angeles Munip. Court (warrant invalidated as overbroad, failing to meet "scrupulous exactitude"), reported in National Law Journal, June 18, 1979, p. 4, col. 2. National Law Journal, Aug. 27, 1979, p. 6, col. 1 (lawyer convicted of battery for resisting execution of warrant, lawyer himself being one target of the investigation).

Other alleged examples of searches of law offices where the lawyers are suspected of no wrongdoing are given at National Law Journal, Apr. 30, 1979, p. 4, col. 1, and Aug. 6, 1979, p. 19, col. 4. See also a general discussion of the increasing use of warrants against lawyers at National Law Journal, Apr. 23, 1979, p. 1, col. 1.

Concern has also been raised about the possibility of searches of physicians' offices invading the physician-patient privilege. Cf. San Francisco Chronicle, Aug. 29, 1979, p. 5 (search of methadone clinic extracting information from 35 patient files).

36/ The trend that does seem evident affecting the media is the increasing frequency of subpoenas of reporters' interview notes at the instance of criminal defendants. See "Subpoenas of Notes of Reporters Grow," N.Y. Times, Nov. 19, 1978, p. 38, col. 1.

Moreover, the fact that third party searches may still be relatively infrequent does not mean that legislation prohibiting such searches is unnecessary; a government abuse need not become widespread before corrective legislation is appropriate. On balance, we believe the need for a third party bill is well founded in the importance of the right of privacy to be protected, even if the current violation of that right falls well short of epidemic proportions.

3. The risks of third party legislation: will evidence be lost?

The major argument against third party legislation turns on the fear that, by requiring the use of subpoenas, it will cause the loss of valuable evidence, severely prejudicing legitimate criminal investigations. We believe, however, that this risk can be held to an acceptable level by authorizing issuance of a warrant whenever it can be shown that the evidence is possessed by a suspect or that there is "reason to believe" that use of a subpoena would result in the loss of the evidence sought.

Ideally, even a person suspected of having committed a crime should not be subject to a search if such suspect could be expected to comply with a subpoena seeking evidence of that

crime.[37/] However, suspects do have a motive for concealing or destroying evidence of their crime. We believe this risk that a suspect will destroy evidence is sufficiently high as to counsel giving law enforcement officials discretion to decide whether a particular suspect can safely be served with a subpoena. The pending third party bills, including S.115, begin with this premise.

This still leaves a twofold risk that evidence will be lost. First, there is the risk that law enforcement officials will be limited to subpoenas with respect to some persons who in fact turn out to have been criminally culpable, and thus motivated to destroy evidence, but whose culpability cannot be demonstrated at the time a search warrant is sought. This risk is highest when evidence is sought during the early stages of an investigation, when law enforcement officials may not have a clear picture of who committed the crime.

But the risk of destruction is not limited to the possible criminal involvement of the possessor. Even if

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37/ In fact, sound law enforcement often follows this policy. For example, anti-trust price-fixing investigations commonly begin with the service of subpoenas duces tecum on companies suspected of having engaged in price-fixing, rather than with the issuance of search warrants and unannounced searches of the company's files.

innocent of the crime, the possessor may wish to destroy evidence if the suspect is a close relative or friend. Similarly, the innocent possessor may be pressured by the suspect, if the suspect learns of the subpoena, either to destroy the evidence or to allow the suspect to do so.38/ Thus even when the evidence is possessed by an undoubtedly innocent third party, a further "risk of destruction" exception is entirely appropriate. The basis of the legislation is the principle that the government should not make unnecessary or unreasonable intrusion into a third party's affairs. But if, upon receipt of a subpoena, a third party (or someone else) would destroy or conceal the evidence, then the intrusion of a search is necessary and reasonable to further the government's legitimate law enforcement interests.39/

38/ E.g., Hearings at 344 (testimony of Assistant Attorney General Heymann).

39/ S.855, in furtherance of its quite distinct First Amendment interests, does not recognize the "risk of destruction" as a basis for a warrant to seize "work product materials," consistent with its placement of such materials wholly beyond the government's reach if the possessor is willing to suffer the penalties for non-compliance with a subpoena (see pp. 20-21, above). For the reasons stated below, we do not favor erecting this procedural shield protecting work product materials (but not their possessor), absent creation of a substantive press privilege as a predicate (see pp. 47-48, below).

The degree of risk that evidence will be lost by requiring the use of subpoenas will be directly affected by the standard of proof required, in order to obtain a warrant, with respect to (i) whether the possessor committed the crime, and thus is not entitled to protection as a third party, and, (ii) even if the possessor is a third party, whether there is a risk the evidence will be destroyed or lost if a subpoena is used. The higher the standard set on either the suspect or the destruction issue the greater the protection of privacy, and the greater the risk to law enforcement. A prudent third party bill must set standards high enough to protect the privacy interests at stake, but not so high as to frustrate criminal investigations.

As reviewed above, S. 115 requires a "probable cause" standard on both the "third party" and the "risk of destruction" issues. S. 855 and S. 1790, in contrast, apply a probable cause standard to the suspect issue, but the "considerably less stringent" standard of "reason to believe" to the risk of destruction issue (see p. 24, above).

In the context of a broad bill protecting all third parties we favor the latter approach, while in the context of a press only bill, a probable cause standard on both issues would be preferable. Since probable cause is a well established concept in the context of determining who is a criminal suspect,

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it is sensible to utilize this familiar standard in defining "third parties." But the lesser standard to govern the risk of destruction is appropriate because the broad third party bill inevitably will apply to some persons who, even though not suspects, may have a motive not to comply with a subpoena. It may be difficult, with respect to some particular third parties, to establish probable cause of a risk of destruction or other loss of evidence, and this persuades us that the lesser "reason to believe" standard is the appropriate one.

Inevitably the courts must be left to work out the specific contours of this "reason to believe" standard on a case by case basis.40/ However, the mere fact of some

40/ One hopefully rare situation which might confront the courts is created a current anomaly -- or so it seems to us -- in Fourth and Fifth Amendment jurisprudence. It appears the state may, consistent with these Amendments, seize from a suspect pursuant to a warrant testimonial documents which incriminate the suspect. Andresen v. Maryland, 427 U.S. 463 (1976). Yet the state cannot, consistent with the Fifth Amendment, command by subpoena that the suspect produce these same documents, thereby incriminating himself. Id., 427 U.S. at 473-74 (dictum); Fisher v. United States, 425 U.S. 391 (1976); In re Grand Jury Subpoena, 466 F. Supp. 325 (S.D.N.Y. 1979). What result under a third party statute if the state, unable to establish that a possessor of documents is a suspect or that there is a risk of destruction, serves a subpoena and is met by the possessor's Fifth Amendment motion to quash (sustained by a court) on the ground that producing the documents "might tend to incriminate" him? Could the successful assertion of such a privilege then be used, either constitutionally or logically, to meet the suspect or risk of destruction standards for issuance of a warrant?

(Footnote continued)

relationship or friendship between suspect and third party should not be sufficient to carry even this lessened burden. It cannot be presumed that most persons will risk contempt penalties, or a prosecution for obstruction of justice, by destroying or concealing evidence to aid a guilty friend or relative. Cf. United States v. Searp, 586 F.2d 1117, 1122 (6th Cir. 1978), cert. denied, 440 U.S. 921 (1979) (suspect's mother having denied consent to search of her home for evidence of son's crime, warrant authorizing night search of mother's home proper since "only an immediate search could prevent the possible destruction of the evidence sought").

In the context of the narrower S. 855, however, limited as it is to a class of third parties presumptively not motivated to destroy evidence, we think the stricter probable cause standard is appropriate to govern the risk of destruction issue. Because the defined class generally will exclude the friends and relatives problem, requiring a probable

(Footnote continued)

Cf. United States v. Howell, 466 F. Supp. 835 (D. Ore. 1979) (government not entitled to a warrant to seize documents the possession of which was established to a probable cause only by the possessor's successful Fifth Amendment motion to quash a subpoena for them). Hard cases make bad law, including bad statutes, but Congress could cover this rarified nuance, if it wished, by an appropriate amendment to the pending bills.

cause showing will not create appreciable risks to criminal investigations.[41/]

We cannot be sure, and Congress cannot be sure, that passage of a third party bill will never result in the destruction of evidence in some future criminal investigation. Indeed, we assume that such incidents will occur from time to time. However, we submit that an occasional loss of evidence is a small price to pay for an increase in the right of privacy of every American -- and a concomitant increase in the security of the press in the proper performance of its function -- especially when it be remembered that in this country "mere evidence" was wholly beyond the reach of law enforcement agencies from the American Revolution until 1967. Warden v. Hayden, 387 U.S. 294 (1967).

In the remainder of this section, we discuss a number of more limited issues raised by these three bills with respect to the form which legislation in this area should take.

4. Should the legislation govern only criminal investigations?

We disagree with the limitation of S.855 and S.1790 to criminal investigations, and prefer the broader approach of S.115, extending to all searches and seizures conducted by the

41/ Ironically, such a showing might have been possible in Zurcher, where apparently the newspaper in question had announced a policy of destroying documents sought by the police. 436 U.S. at 568, n. 1 (Powell, J., concurring).

government. The privacy interest in being free of unnecessarily intrusive governmental searches is not limited to the criminal investigation context. Cf. Camara v. Municipal Court, 387 U.S. 523 (1967) (Fourth Amendment requires warrant as predicate for administrative search for possible violations of housing code). Nor is such a limitation rational in a bill intended to protect solely non-suspect third parties. Thus, a seizure of documents in administrative or other civil matters, such as in proceedings to enforce tax judgments, seems equally offensive and unnecessary and should be subject to the same subpoena-first requirement as a search in aid of criminal investigation. If a special exception is thought necessary to exempt "foreign intelligence operations" (Cong. Rec. S 3792, Apr. 2, 1979), such a specific exception can be inserted without a general exclusion of all non-criminal investigations.

5. Should the legislation apply to just documentary materials, or all evidentiary matter?

We prefer the coverage in S.115 of all evidentiary matter to the more limited "documentary materials" scope of S.1790. The limitation to documents does have logic in the context of a bill addressed to the protection of First Amendment interests (S.855), or one focusing upon the attorney-client privileged communications (Title II of S.1790). Further, the

dangers of a rummaging search (see pp. 14-15, above) are limited to documentary materials, for the most part, as distinct from more easily isolated items of tangible evidence.

But the document limitation is not substantially related to the privacy interests sought to be protected by a broad third party bill such as we favor. The right to be free of unnecessary police searches is not substantially less violated when the search is for a tangible object rather than for a document. Thus we believe the legislation should restrict searches for any type of evidence.

6. Should the legislation exclude contraband, fruits and instrumentalities

For similar reasons, the more limited exclusion in S.115 of contraband would not appear justified on a per se basis.[42/] Of course, the fact that the material sought is contraband may often have important relevance in analyzing whether its possessor is a probable criminal suspect or whether the materials would be destroyed given advance notice, but such showing should be made on an individualized basis. If

42/ It would appear that this contraband exception does not apply under S.855 and S.1790 -- except that contraband (as well as any "fruits and instrumentalities" of a crime) does not enjoy the special "work product material" protections -- since the definition of documentary materials does not exclude contraband (S.855, § 5(a); S.1790, § 6(a)).

the material is in the possession of an innocent third party and there is no showing of any risk of its destruction, there would appear to be no generally applicable reason to fail to protect the privacy interests of the third party because, unknown to such third party, the material he possesses happens to be contraband, rather than fruits or instrumentalities of a crime or "mere evidence." Indeed, in the context of searches and Fourth Amendment interests, the Supreme Court has told us there is "no viable reason to distinguish" these categories. Warden v. Hayden, 387 U.S. 294, 310 (1967).

7. Nature of the warrant procedure

The pending bills, in our view, are imprudently vague with respect to the role of the court in determining whether a warrant may issue consistent with their terms.

S.115 does specify that if the government seeks a search warrant by reason of the "risk of destruction" exception (or the contraband exception) it must establish such an exception by affidavit or testimony "upon ... personal knowledge" before a judge or magistrate. But S.115 does not specify that a similar procedure and standard are to govern the initial determination of whether the possessor of evidence is a third party.

S.855 and S.1790, similarly, do not specify that a magistrate or judge must decide if documents "are possessed in connection with a purpose of public communication," or whether the various exceptions permitting use of a warrant are present. They provide only that, when such an exception is present, a search and seizure "pursuant to otherwise applicable law" is not prohibited (S.855, §§2(a) and 2(b)).

It might be creditably argued that the Fourth Amendment, by its own force, does not require that a magistrate review the compliance of a warrant application with the provisions of a third party statute, to the extent such provisions go beyond the requirements of the Fourth Amendment's "bare bones." The matter should not be left to implication. Because we certainly do believe that a judge or magistrate, not law enforcement agencies sua sponte, should determine when a warrant may issue, the bills should be amended to require that the grounds for issuance of a warrant consistent with their terms must be made out before, and the warrant be issued by, a judge or magistrate.

8. Nature of the subpoena procedure

Where use of a search warrant (or equivalent) order is prohibited, S.115 specifies the subpoena procedure which must be followed: a hearing upon notice, with consideration on

the merits of the legality of the subpoena and of any available privileges or other defenses to production. S.855 and S.1790, on the other hand, proceed only by implication in referring to use of a "subpoena duces tecum" process where a search and seizure is prohibited.

In our view, the approach of S.115 is preferable in specifying those key procedural rights of notice, hearing, and consideration on the merits which must be afforded. The details of the procedure, such as the exact notice which must be given or the particular form of the hearing, are wisely left to local law to avoid unnecessary federal mandates.

Because some states do not now recognize a subpoena procedure,[43/] it may be appropriate to delay the effective date of S.115 a short time, so that the states may make any desired or necessary revisions in their own criminal procedure laws.

9. Post-hearing procedures

S.115, by its own silence on the point, leaves to local law all questions relating to the procedure to be

43/ This fact has been cited in opposition to a third party bill. E.g., Hearings at 319-20 (statement by National District Attorneys Assoc.). However, in our view the absence of a subpoena procedure in some states argues in favor of the need for federal legislation requiring use of this lesser intrusive means of investigation, whenever possible without substantial risk of the loss of evidence.

followed after an order directing compliance with a subpoena has been issued. We believe this is the wise approach, both because the myriad circumstances which might confront a court are difficult of generalized anticipation in a statute, and because the extent to which this federal statute restricts state procedure should be minimized. The basic restriction being imposed upon the states in limiting the use of search warrants is of major importance, and also involves not insubstantial constitutional difficulties (see pp. 48-57, below). Achievement of this general principle should not be jeopardized by attempting to go further, and imposing even more detailed requirements upon the state and local governments. If experience under the statute should identify some particular and frequent abuse, there will be time enough then to amplify the protections afforded by the statute though amendment.

Thus, we do not favor the particular provisions of S.855 and S.1790 which allow a court to order the search and seizure of materials, after an order directing compliance with a subpoena duces tecum has not been obeyed, either after the exhaustion of all appellate remedies, or a special showing that the "interests of justice" cannot abide the exhaustion of these appellate remedies (see p. 20, above). These provisions indeed may give affirmative encouragement to restrictions upon

appellate remedies otherwise available under local law, hardly serving the interests S.855 intends to protect.

10. The question of privilege

Title II of S.1790 recognizes that one cause of special concern in the area of third-party searches is the danger that, absent use of a subpoena process, materials within the attorney-client and other privileges would be indiscriminately searched and seized and the privilege lost or placed in great jeopardy. Therefore, it recognizes the existence of a privilege as self-sufficient to preclude the use of search warrants. However, Title II goes on to provide that a warrant to seize privileged materials may issue if one of the four standard S.855 exceptions is shown. We strongly disagree, for honoring these exceptions would limit privileges otherwise available under local law.

In most jurisdictions, and with most privileges, a finding of privilege places a document wholly beyond the government's reach by either warrant or subpoena, and regardless of whether, for example, the possessor has committed a crime. E.g., Fisher v. United States, 425 U.S. 391, 403-05 (1976). We think the contrary result of Title II may be unintended, for the bill purports to defer entirely to local law to determine the nature and scope of any privileges. In any event the result is not sound and Title II should be accordingly amended.

The approach of S.115, requiring the court in the subpoena hearing to consider any questions of privilege, is far preferable. But we would favor adding to this protection a requirement that any court, before issuing a warrant, make an affirmative finding that there is no probable cause to believe that the documents are privileged from production under applicable law.

11. National defense, possession exemptions

We approve the provision applicable to "documentary materials" in S. 855 which, in instances where the crime investigated consists of the "receipt, possession, communication or withholding" of the very documentary materials sought by the government, makes inapplicable the "suspect exception" ground for issuance of a warrant. Given the danger of rummaging searches where particular documents are sought and the narrow class of "public communicators" protected by S.855, this provision seems sensible since the use of warrants would be unnecessary and intrude upon important First Amendment interests.[44/] While such a "public communicators" provision does

44/ We are troubled by the breadth of the exemption from this exception for crimes "relating to the national defense, classified information, or restricted data" under specified statutes. The breath of the language is that of the referenced statutes:

(footnote continued)

not readily fit within the structure of S.115, it could be added by specific amendment.

(Footnote continued)

18 U.S.C. §§793-94 (gathering or transmitting information "relating to the national defense" with "reason to believe" it is to be used "to the injury of the United States, or the advantage of a foreign government"); 18 U.S.C. §797 (publishing photographs of designated military installations); 18 U.S.C. §798 (disclosure of classified information concerning secret codes or communication intelligence activities); 42 U.S.C. §§2274-75, 2277 (communication, receipt, or disclosure to "any person not authorized to receive" it, of any "Restricted Data," being data "concerning" the design, manufacture or use of atomic weapons or the production or use of nuclear material, 42 U.S.C. §2014(y)); and 50 U.S.C. §783 (unlawful for employee of United States to communicate to member of "any Communist organization" (as defined) "any information of a kind classified by the President ... as affecting the national security").

Given the vagueness of such terms as "national defense" and "national security", there is some danger that S.855 might be construed as affirmatively authorizing the issuance of warrants, especially against the press, in situations where the courts presently would preclude their issuance on First Amendment grounds.

In our view this is not the intent or effect of the bill. Within its scope, it precludes the use of warrants otherwise permitted "pursuant to otherwise applicable law".... (S.855 §2(b)); but it does not authorize the use of warrants where contrary to "otherwise applicable law." However, it may be desirable to add language more clearly expressing this intent with respect to the national defense and security provision, which is phrased in affirmative terms, i.e., "a search and seizure may be conducted...." S.855 §2(b)(1).

12. Remedies

All three bills rely on a civil damage action as the remedy for their violation. Such a damage remedy is necessary since the victims of the violations will be third parties, for whom the exclusionary rule applicable in criminal proceedings can afford no redress.

With respect to the measure of monetary relief, we prefer the more liberal provisions of S.855 and S.1790 to the narrower terms of S.115. All three bills permit the recovery of punitive damages, but S.115 restricts this award to $1,000 for each violation (§4(d)). Further, only S.855 and S.1790 provide for a minimum liquidated compensatory damage award of $1,000. This provision for liquidated damages is sensible, given the difficulty of quantifying compensatory damages. However, the amount of $1,000 is too low to be meaningful, either as an incentive to sue or as a deterrent against violations of the statute, and thus should be increased substantially.

S.115 permits the damage action to be maintained both against any federal, state or local governmental unit, and any officers or employees of such unit who have committed or have caused to be committed the violation. This provision is broader than its counterparts in S.855 and S.1790, which

permit the individual officers or employees to be sued only in the special situation of a state which has not waived its sovereign immunity, an immunity which S.115 does not recognize.45/

We prefer the approach of S.115, since the possibility of personal liability should encourage individual law enforcement agents to comply with the statute. We do believe that personal liability should not be imposed upon an agent who has acted under "a reasonable belief in the lawfulness of his conduct" (S.855, §4(a)(2)).46/ To impose personal liability even despite such "good faith" would be unduly punitive, and unnecessary to recompense the victim given the availability of the government as a defendant. S.115 should be amended expressly to recognize this good faith defense, although nothing in the present text of S.115 would preclude the defense.

45/ These contrasting treatments of the states' Eleventh Amendment immunities are a product of the different provisions of the Constitution upon which the bills are premised. See note 57, below.

46/ See, e.g., Wood v. Strickland, 420 U.S. 308 (1975) (good faith defense available to officials sued for violations of 42 U.S.C. §1983).

It has been suggested by this Association, in connection with analogous pending legislation, that the plaintiff, not the individual agent defendant, should bear the burden of proof with respect to this question of "reasonable belief" or "good faith", at least where the governmental entity is also available as a defendant. Committee on Federal Legislation, "Proposed Amendments to the Federal Tort Claims Act, A Summary," 34 The Record 768, 777 (1979). However, this Committee believes that, at a minimum, the agent should bear the burden of going forward on this issue, since the agent plainly is best able to testify as to the agent's own belief and state of mind at the time the agent acted.

13. The non-compliance option of S.855 for "work product materials"

As noted (see pp. 20-21, above), provisions of S.855 and S.1790, as a general rule, would place wholly beyond the government's reach -- by any process -- public communication "work product materials." Thus, if a court should sustain the validity of a subpoena seeking production of work product materials, under these bills a search for such materials would be prohibited, although the stiff sanctions of a jail sentence for contempt and substantial fines would continue to be available for violation of the subpoena.

In our view, these provisions are unnecessary. We are not aware of any instance to date in which a court, following refusal of a newspaper or reporter to comply with a valid subpoena, has authorized that a search be conducted to locate the subpoenaed materials. Such a remedy presumably is not employed because of its recognized futility, and because of the serious invasion of First Amendment interests which would result from a rummaging search through a newspaper's offices, or a reporter's home, seeking the subpoenaed materials. Rather, courts have struck a balance in these instances between First Amendment interests and such competing interests as a defendant's right to a fair trial by not authorizing searches, but rather considering and sometimes imposing such coercive sanctions as a jail sentence and fines until compliance with

the subpoena is forthcoming, or the proceeding in which it was issued is terminated.

In light of the lack of any past or apparent threatened use of search warrants in this post-subpoena context, we believe that these provisions of S.855 and S.1790 should be deleted. Further, we think it preferable that consideration of any such absolute prohibitions of post-subpoena searches be undertaken only in conjunction with consideration of a statute recognizing a substantive privilege for the press against production of certain confidential source information. Several states have enacted such "shield laws," and this Association already is on record in support of limited federal legislation in this area.47/

In the absence of federal legislation on the proper scope of such a substantive privilege, we do not believe it appropriate for Congress to limit the discretion of the courts in determining the proper remedies or sanctions upon non-compliance with a valid subpoena. There will be time enough to consider the need for any such limitation of judicial discretion should the courts, contrary to their practice to date, begin to view search warrants as an appropriate post-subpoena remedy despite the unique First Amendment problems which are raised by any search of newspaper offices.

47/ United States Senate Committee on the Judiciary, Subcommittee on Constitutional Rights, Hearings on Newsmen's Privilege 379-90, 700-20 (93rd Cong., 1st Sess.) (testimony and report by Association's Committee on Federal Legislation).

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C. The Constitutional Basis for Federal Legislation Binding on the States

1. The Fourth Amendment "third party" bill

While the question is not free from doubt, we believe that Congress has power under Section 5 of the Fourteenth Amendment to enact a third party bill (such as S.115) binding on the states, and not merely on the federal government. Such a bill would not conflict with the Supreme Court's holding in Zurcher that the Fourth Amendment itself, as applied to the states through the due process clause of the Fourteenth Amendment, does not prohibit per se the conduct of third party searches upon warrant.

Zurcher did not, of course, hold that all third parties searches pursuant to a warrant will be reasonable, but only that a third party search is not unreasonable because it is conducted pursuant to a warrant. Zurcher v. Stanford Daily, supra, 436 U.S. at 559-60. Congress would be well justified in finding, however, that many such warranted searches have been and will be "unreasonable," in violation of the Fourth Amendment, for such other reasons as these:

-- a warrant may issue despite the absence of probable cause for the search, especially since magistrates appear not to perform their ex parte review of warrant applications with unvarying exactitude;

-- the affidavits or other papers submitted to the magistrate in support of the warrant application may be false;

-- the warrant itself may be too general in its terms, failing to describe with sufficient particularity "the place to be searched, and the persons or things to be seized"; and

-- the officers executing the warrant may exceed the scope of a properly drawn warrant, and engage in general rummaging similar to the prohibited general search, or may execute the warrant in an unreasonable manner.48/

Congress could also reasonably find that total reliance on the ex parte warrant process, coupled with the after-the-fact adjudication of the propriety of the warrant and resultant search, is insufficient to secure third parties in their constitutional right to be free of unreasonable searches. Prime reliance for deterring and remedying Fourth Amendment violations has been placed on the exclusionary rule. But the exclusionary rule provides neither a remedy for third parties nor deterrence against unreasonable searches of third parties. The third parties will not be defendants in criminal proceedings in which any unconstitutionally seized evidence is sought to be admitted, and the defendants in those proceedings

48/ Since the Supreme Court in Zurcher disclaimed any holding that a third party search conducted pursuant to a proper warrant could "never" be unreasonable, "however or wherever executed" (436 U.S. at 559-60). Thus it would seem that the timing and manner of a third party search can be so unreasonable as to violate the Fourth Amendment, e.g., a

(footnote continued)

usually will be denied standing to assert the Fourth Amendment rights of third parties. See Alderman v. United States, 394 U.S. 165 (1969).

Persons victimized by an unconstitutional search may recover damages under statute, in the case of violations by state agents (42 U.S.C. §1983), and under the Fourth Amendment itself with respect to violations by federal agents. Bivens v. Six Unknown Agents, 403 U.S. 388 (1971). But this remedy is of questionable practical value, since the invasion of privacy caused by an unreasonable search is not readily quantifiable in dollars and would seldom justify the heavy costs of litigation. In addition, even if this remedy for past violations was of greater value, it would be no substitute for a procedure preventing unreasonable third party searches in the first place.

Finally, Congress may find that a third party bill requiring the use of subpoenas would provide a direct and effective way of minimizing unreasonable searches by affording the opportunity for an adversary hearing before the search is

(footnote continued)

search conducted in the middle of the night by an unannounced forced entry into a residence. See United States v. Murrie, 534 F.2d 695, 698-99 (6th Cir. 1976) (applying 18 U.S.C. §3109 and Fourth Amendment). A particularly egregious instance, in which officers executed a warrant in the early morning hours with considerable brutality, and at the wrong premises, is reported in Duncan v. Barnes, 592 F.2d 1336 (5th Cir. 1979) (doors to the wrong apartment broken down with sledge hammer, occupants forced to stand nude while search conducted, personal property damaged, and premises left in disarray: judgment dismissing complaint reversed).

conducted.[49/] The intended subject of the search would be able to point out errors papers submitted in support of the search, to urge greater particularization of the things sought to be seized or other safeguards designed to minimize the inconvenience and invasion of privacy occasioned by the search, or, in the alternative, to search for and turn over voluntarily the evidence sought (see pp. 12-16, above).

We believe that, upon such legislative findings,[50/]

49/ The subpoena process would also eliminate some "reasonable" constitutional searches which nonetheless significantly and unnecessarily invade a third party's privacy. If, for example, law enforcement officials properly obtain a warrant in reasonable reliance upon what turns out to have been totally erroneous information, the resulting search plainly will constitute a serious invasion of privacy even though made upon probable cause and therefore not "unreasonable." Likewise, execution of a warrant seeking certain documents, even if describing the documents with the particularity required by the Fourth Amendment, often will require much "reasonable" searching through irrelevant documents to locate those sought.

50/ It should be noted that the Zurcher Court's decision was influenced in part by the absence of any factual showing in the record before it that prohibiting the use of warrants was necessary to protect the Fourth (or First) Amendment rights of third parties. Thus the Court stated that use of warrants should not be suppressed "without solid evidence supporting the change," on a record "barren of anything but the District Court's assumptions to support its conclusions" (436 U.S. at 561). Likewise, in the context of newspaper searches, the Court noted the record reflected very few instances of past abuses of the warrant power, suggesting that greater evidence of past or threatened abuse might lead it to strike a different constitutional balance (436 U.S. at 566). This suggests that the Court may defer to congressional findings even at variance with those it reached on the record before it. Cf. Bakke v. Board of Regents, 438 U.S. 265, 307-10 (1978) (Justice Powell on deference due legislative findings of need for remedial legislation to counter effects of societal racial discrimination).

a third party bill would be sustained as a proper exercise of Congress' power, under Section 5 of the Fourteenth Amendment, "to enforce, by appropriate legislation, the provisions of this article". Congress has broad, although not unlimited, power under Section 5 to devise appropriate remedies to enforce the guarantees of the Amendment.[51/] It "may use any rational means" to effectuate and secure guaranteed rights. See South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966) (construing Congress' power to enforce the Fifteenth Amendment under Section 2 thereof). The basic test controlling the scope of Congress' power is that which applies to the exercise of all other express powers of Congress:

> "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional" (McCulloch v. Maryland, 4 Wheat 316, 421, (1819), quoted in South Carolina v. Katzenbach, supra, 383 U.S. at 326).

So long as Congress directs its remedy at the "evils . . . comprehended" by the constitutional prohibition it seeks to enforce (South Carolina v. Katzenbach, supra, 383 U.S. at 326), and the remedy is "an appropriate means of combating the evil" (id., 383 U.S. at 328), the precise form and scope of the remedy are questions over which Congress has a considerable discretion.

51/ While not addressing the issue of Congress' power to legislate in this area pursuant to the Fourteenth Amendment, the Court in Zurcher did not preclude such legislation (see p. 6, above).

It seems clear that Congress' enforcement power is not limited to providing damage remedies for past violations or injunctive relief for specific threatened violations. It may also enact broad prophylactic measures reasonably designed to minimize future violations, even if its remedy paints with a broad brush and prohibits some governmental conduct which, if addressed separately, would not be held violative of the Constitution.

One example of such a prophylactic measure is section 5 of the Voting Rights Act of 1965 (79 Stat. 437, 42 U.S.C. § 1973), in which Congress prohibited all states subject to the Act (i.e., those with less than 50% of their voting age residents registered to vote) from enforcing any new form of voter qualification without first securing clearence from the United States Attorney General, or a determination from a federal court that the qualification would not perpetuate voting discrimination. In South Carolina v. Katzenbach, 383 U.S. 301 (1966), the Court sanctioned this statute as a proper exercise of Congress' power to enforce the Fifteenth Amendment's prohibition against voting discrimination, even though surely Congress could not properly have predicted that all such new qualifications would be discriminatory. It was enough, said the Court that some newly devised voter qualifications had been used to discriminate in the past, and that "Congress had reason

to suppose that these states might try similar maneuvers in the future...." (383 U.S. at 335).

In Katzenbach the Court also sustained a suspension of all literacy tests in such states, even though the Court itself had earlier decided that all literacy tests on their face did not violate the Fifteenth Amendment. Lassiter v. Northampton County Board of Elections, 360 U.S. 45 (1959). Since Congress reasonably had found that literacy tests often had been used to discriminate against black voters, and that case-by-case litigation was not adequate to combat this discrimination, Congress was justified in using a broader prophylactic approach to the problem. See South Carolina v. Katzenbach, supra, 383 U.S. at 328.

The Court went further in Oregon v. Mitchell, 400 U.S. 112 (1970). Although divided on many issues, it was united in sustaining Congress' power to suspend all literacy tests throughout the country as a means of enforcing the Fifteenth Amendment. While stating somewhat different grounds for their decision, all Justices deferred to the power of Congress to devise appropriate means to secure the guarantee of the Fifteenth Amendment, even though the Court itself had refused to impose such a flat prescription of literacy tests

under the Amendment itself.[52] Justice Stewart, in an opinion joined by the Chief Justice and Justice Blackman, noted the crucial difference between Congress' power to legislate to prevent future constitutional violations and the Court's limited case-by-case power of adjudication:

> "In the interests of [nationwide] uniformity, Congress may paint with a much broader brush than may this Court, which must confine itself to the judicial function of deciding individual cases and controversies upon individual records" (400 U.S. at 284).

A third-party bill maximizing the use of subpoenas to minimize the incidence of unreasonable third party searches, thus better securing rights guaranteed by the Fourteenth Amendment, would be within Congress' Section 5 power, as defined by the Court in these analogous Fifteenth Amendment cases.[53] While the Court in Zurcher has held that the failure to use a subpoena does not per se render a third party

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52/ Justice Harlan, for example, reasoned as follows:

> Despite the lack of evidence of specific instances of discriminatory application or effect, Congress could have determined that racial prejudice is prevalent throughout the Nation, and that literacy tests unduly lend themselves to discriminatory application, either conscious or unconscious. This danger of violation of § 1 of the Fifteenth Amendment was sufficient to authorize the exercise of Congressional power under § 2. (400 U.S. at 216).

53/ See generally, Hearings at 365-79 (testimony of Professors Paul Bender and William Cohen).

search pursuant to a warrant unreasonable, Congress would not be inconsistent in finding that the use of subpoenas would appreciably reduce the incidence of unreasonable searches. Just as Congress was justified in broadly banning all literacy tests, even though not all of them had been or would have been used to discriminate invidiously against minorities, so Congress can ban searches by warrants of a reasonably defined class of third parties,[54/] even though not all such searches would be unreasonable.[55/]

54/ The line between third parties and suspects is a reasonable one, even though both groups share in common the interest in being free of unreasonable searches, and even though the nature of the government's need for evidence does not vary with its possessor. The distinction is well founded in the greater need to protect third parties by a prophylactic remedy in view of their inability to resort to the exclusionary rule, and in the greater need to allow law enforcement agencies use of ex parte warrants in dealing with suspects, who may well be motivated to destroy incriminating evidence if given advance notice of the government's intention to seize it.

It is true that the Court in Zurcher did not find such a third party-suspect distinction mandated in the Fourth Amendment's "balance between privacy and public need" (436 U.S. at 559). But it is to be expected that the Court would not hold irrational or unreasonable contrary findings by Congress, just as it accepted Congress' findings with respect to literacy tests even though at variance with the Court's own conclusions in prior cases.

55/ There is another possible but more controversial basis for a third party bill: the arguable right of Congress

(Footnote continued)

2. The public communicators bill

The Administration has based its opposition to a third party bill in part on doubts concerning its constitutionality, and has argued that its own more narrow bill (S. 855) would be a proper exercise of Congress' power to regulate interstate commerce.[56/] While disagreeing with the former view, we do agree with the latter, given the pervasive involvement of those protected by S. 855 -- the press and

(Footnote continued)

to disagree with the Supreme Court's interpretation of the Fourth Amendment in Zurcher, and thus to find that all third party searches by warrant do constitute violations of the Fourth Amendment. Such a theory gains support from the alternative holding in Katzenbach v. Morgan, 384 U.S. 641, 648-52 (1966) (Congress' invalidation of New York's English literacy requirement for voting sustained as appropriate legislation to enforce the equal protection clause, whether or not the requirement itself violated equal protection). However, the current viability of the Morgan rationale, claiming a power in Congress "to define the substantive scope of the amendment," cf. Katzenbach v. Morgan, 384 U.S. 641, 668 (1966) (Harlan, J., dissenting), is subject to doubt. In Oregon v. Mitchell, supra, by a 5 to 4 vote the Court refused to sustain Congress' lowering of the voting age in state elections from 21 to 18 as a permissible exercise of Congress' power to enforce (and define the scope of) the equal protection clause. See generally, Cohen, Congressional Power to Interpret Due Process and Equal Protection, 27 Stan. L. Rev. 603 (1975).

There is no need to enter this thicket, in our view, since a third party bill can be sustained as a purely remedial enforcement measure to minimize future unreasonable searches plainly violative of the Constitution.

56/ Hearings at 333-34, 340 (testimony of Assistant Attorney General Philip B. Heymann).

others intending some form of "public communication" -- with interstate commerce and the broad reach traditionally given Congress in its exercise of regulatory power under the commerce clause.[57/] See, e.g., Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Wickard v. Filburn, 317 U.S. 111 (1974). The special First Amendment interests jeopardized by the searches prohibited by S. 855 provide a rational basis for singling out the subject of "public communication" for special protection. Even though the Court has been resistent to arguments by the media for special protection directly under the First and Fourth Amendments,[58/] it has recognized that First Amendment interests often require special treatment in the context of searches and seizures.[59/]

57/ Use of the commerce clause also would appear to restrict the remedies which could be afforded for violations of a press bill. The Eleventh Amendment renders the states immune from damage remedies for violations of prior enacted provisions of the Constitution, such as the commerce clause. But the states can be held liable in damages, upon express statutory authorization by Congress, for violations of the subsequently enacted Fourteenth Amendment. Hutton v. Finney, 437 U.S. 678 (1978); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

58/ See, e.g., Zurcher v. Stanford Daily, supra, 436 U.S. at 568-70 (Powell, J., concurring); Branzburg v. Hayes, 408 U.S. 665 (1972).

59/ See Zurcher v. Standord Daily, supra, 436 U.S. at 564, and cases there cited. See also United States v. Sherwin, 572 F.2d 196, 199-201 (9th Cir. 1977), cert. denied, 437 U.S. 909 (1978) (neither "nexus" nor "plain view" exceptions to the warrant requirement apply when materials seized "are arguably protected by the First Amendment").

But while the constitutionality of S.855 bill should thus be sustained, the interests sought to be protected by all pending Zurcher-related legislation are rooted in the Bill of Rights, not the commerce clause. A third party bill premised on the Fourteenth Amendment more directly reflects the true justification for restricting the states' power to use search warrants.

CONCLUSION

Innocent citizens should not be subjected to the intrusion of a government search, unless there is reason to believe that the evidence could not be obtained through the less intrusive means of a subpoena. Congress should enact legislation which ensures that prosecutors and law enforcement agencies use that less intrusive means, and thus secure both the right of privacy and the interest in a vigorous free press shared by all citizens.

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